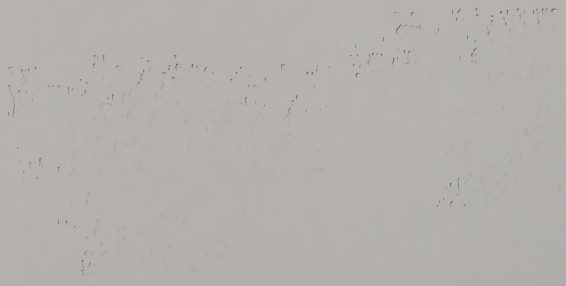
WASHINGTON PRACTICE

Washington Pattern Jury Instructions

Civil

WASHINGTON
SUPREME COURT COMMITTEE
ON JURY INSTRUCTIONS



WASHINGTON PRACTICE SERIES™

Volume 6A

Washington Pattern Jury Instructions—Civil

WPI

SEVENTH EDITION

Issued in July 2019

Prepared by the
WASHINGTON SUPREME COURT
COMMITTEE ON JURY INSTRUCTIONS

THOMSON REUTERS®

For Customer Assistance Call 1-800-328-4880

Mat #42553159

© 2019 Thomson Reuters

This publication was created to provide you with accurate and authoritative information concerning the subject matter covered; however, this publication was not necessarily prepared by persons licensed to practice law in a particular jurisdiction. The publisher is not engaged in rendering legal or other professional advice and this publication is not a substitute for the advice of an attorney. If you require legal or other expert advice, you should seek the services of a competent attorney or other professional.

Nothing contained herein is intended or written to be used for the purposes of 1) avoiding penalties imposed under the federal Internal Revenue Code, or 2) promoting, marketing or recommending to another party any transaction or matter addressed herein.

HIGHLIGHTS

The instructions that are listed below are new or have been revised for the seventh edition of the Washington Pattern Jury Instructions—Civil (Washington Practice, Volumes 6 and 6A, Civil Pattern Jury Instructions (7th edition)).

The seventh edition also includes new and revised instructions that were first published in either the 2013 Supplement or the 2017–2018 Supplement to the sixth edition of the civil pattern jury instructions. New and revised instructions for WPI Chapters 107 (Legal Malpractice), 165 (Negligent Misrepresentation), 310 (Consumer Protection Actions), 320 (Insurance Bad Faith Actions), 340 (Civil Rights—General introductory Instructions), 341 (Civil Rights—Municipal and Local Government Liability), 342 (Civil Rights—Fourth Amendment—Unreasonable Search and Seizure), and 348 (Civil Rights—Damages and Verdict Forms) were included in the 2013 Supplement. New and revised instructions for WPI Chapters 110 (Product Liability), 150 (Eminent Domain—General Instructions), 151 (Eminent Domain—Special Instructions), 155 (Workers' Compensation), 330 (Employment Discrimination), 360 (Involuntary Treatment—Mental Illness), 365 (Involuntary Treatment—Sexually Violent Predators), and 380 (Nuisance) were included in the 2017-2018 Supplement.

New or revised instructions first published in the seventh edition:

- WPI 0.10, 1.01, 1.02, 1.08, 1.11;
- WPI 6.02, 6.15, 6.17;
- WPI 16.03, 16.04, 16.04.01, 16.05;
- WPI 21.09;
- WPI 31.06.01;
- WPI 32.04, 32.06.01;
- WPI 100.08;
- WPI 105.02.01, 105.02.02, 105.02.03, 105.09, 105.20, 105.21;
- WPI 120.05, 120.07;
- WPI 140.01, 140.01.01, 140.02, 140.04;

- WPI 150.16;
- WPI 155.01;
- WPI 320.01.01, 320.02, 320.06, 320.06.01;
- WPI 330.51;
- WPI 340.00, 340.01, 341.02, 341.04;
- WPI 342.03, 342.10;
- WPI 343.00, 343.01, 343.02, 343.03, 343.04, 343.05, 343.06, 343.07, 343.08;
- WPI 348.02;
- WPI 360.01, 360.02, 360.20; and
- WPI 365.01, 365.02, 365.20, 365.30.

The Washington Pattern Instructions Committee
September 2018

WASHINGTON SUPREME COURT COMMITTEE ON JURY INSTRUCTIONS

As constituted for the Seventh Edition of Volumes 6 and 6A

Committee Co-Chairs

HON. HELEN L. HALPERT (Ret.), King County Superior Court, Seattle

HON. LINDA C. KRESE, Snohomish County Superior Court, Everett (Co-chair, 2017–present)

Committee Members

PROF. DEBORAH M. AHRENS,
Seattle University School of Law, Seattle

EDWIN ARALICA, Attorney, Kent

DARRELL L. COCHRAN, Attorney, Tacoma

ANNE MOWRY CRUSER, Attorney, Vancouver

JOEL DEAN CUNNINGHAM, Attorney, Seattle

PROF. DAVID K. DEWOLF (Emeritus),
Gonzaga University School of Law, Spokane

CALLIE T. DIETZ, State Court Administrator, Olympia

HON. WILLIAM L. DOWNING (Ret.),
King County Superior Court, Seattle

DAVID J. ELDRED, Attorney, Seattle

SUZANNE L. ELLIOTT, Attorney, Seattle

CHAD M. ENRIGHT, Attorney, Port Orchard

SETH A. FINE, Attorney, Everett

LINDA M. GALLAGHER, Attorney, Seattle

TODD W. GARDNER, Attorney, Seattle

HON. ANNE C. HARPER, King County District Court, Seattle

HON. BRUCE HELLER (Ret.), King County Superior Court, Seattle

HON. GREGG HIRAKAWA, King County District Court, Seattle

ASSOC. DEAN HEIDI S. HOLLAND,
Gonzaga University School of Law, Spokane

PROF. MAUREEN HOWARD,

University of Washington School of Law, Seattle
GARTH L. JONES, Attorney, Hoquiam
KEITH L. KESSLER, Attorney, Hoquiam
HONORABLE DAVID A. KURTZ,
Snohomish County Superior Court, Everett
BRUCE E. LARSON, Attorney, Seattle
AMANDA E. LEE, Attorney, Seattle
PAMELA B. LOGINSKY, Attorney, Olympia
HON. MICHAEL G. MCCARTHY,
Yakima County Superior Court, Yakima
MARGARET A. PAHL, Attorney, Seattle
HON. MARILYN G. PAJA, Kitsap County District Court, Port Orchard
HON. KRISTIN V. RICHARDSON,
King County Superior Court, Seattle
REBECCA J. ROE, Attorney, Seattle
WILLIAM J. RUTZICK, Attorney, Seattle
MARY H. SPILLANE, Attorney, Seattle
DONALD G. STONE, Attorney, Spokane
KARL B. TEGLAND, Attorney, Mill Creek
JEFFREY I. TILDEN, Attorney, Seattle

Counsel and Reporter

LYNNE R. ALFASSO, Administrative Office of the Courts, Olympia

Subcommittee Members

HON. BETH M. ANDRUS (Chapter 330, Employment Discrimination, and Chapter 360, Involuntary Treatment—Mental Illness), King County Superior Court, Seattle
BROOKE E. BURBANK (Chapter 365, Involuntary Treatment —Sexually Violent Predators), Attorney, Tacoma
KENNETH M. CHANG (Chapter 365, Involuntary Treatment —Sexually Violent Predators), Attorney, Seattle
JOSHUA CHOATE (Chapter 365, Involuntary Treatment—Sexually Violent Predators), Attorney, Seattle
DARYL DEUTSCH (Part X-A, Eminent Domain), Attorney, Bellevue
JEFFREY P. DOWNER (Chapter 107, Legal Malpractice), Attorney, Seattle
CHRISTIE JOHNSON FIX (Chapter 330, Employment Discrimination), Attorney, Seattle
KELBY D. FLETCHER (Chapter 330, Employment Discrimination), Attorney, Seattle
CLIFFORD FREED (Chapter 330, Employment Discrimination),

Attorney, Seattle

EULA GARRISON (Chapter 360, Involuntary Treatment—Mental Illness), Attorney, Tacoma

JOHN MATTHEW GEYMAN (Chapter 310, Consumer Protection Actions), Attorney, Seattle

DEVON GIBBS (Chapter 365, Involuntary Treatment—Sexually Violent Predators), Attorney, Seattle

BEVERLY NORWOOD GOETZ (Chapter 155, Workers' Compensation), Attorney, Seattle

ROBERT B. GOULD (Chapter 107, Legal Malpractice), Attorney, Edmonds

JEFFREY A. JAMES (Chapter 330, Employment Discrimination), Attorney, Bellevue

MICHAEL L. HALL (Chapter 155, Workers' Compensation), Attorney, Seattle

THOMAS V. HARRIS (Chapter 320, Insurance Bad Faith Actions), Attorney, Seattle

BRIAN KING (Chapter 310, Consumer Protection Actions), Attorney, Seattle

AMBER L. LEADERS (Chapter 360, Involuntary Treatment—Mental Illness), Attorney, Seattle

WAYNE LIEB (Chapter 155, Workers' Compensation), Attorney, Olympia

JAMES E. LOBSENZ (Part XVII, Civil Rights), Attorney, Seattle

PETER L. MAIER (Chapter 310, Consumer Protection Actions), Attorney, Seattle

ELIZABETH A. MCINTYRE (Chapter 330, Employment Discrimination), Attorney, Tumwater

ROBERT MILHEM (Chapter 155, Workers' Compensation), Attorney, Spokane

ANNE E. MIZUTA (Chapter 360, Involuntary Treatment—Mental Illness), Attorney, Seattle

ANDREW MORRISON (Chapter 365, Involuntary Treatment—Sexually Violent Predators), Attorney, Spokane

REBECCA S. RINGER (Chapter 105, Health Care), Attorney, Seattle

JERRET E. SALE (Chapter 320, Insurance Bad Faith Actions), Attorney Emeritus, Seattle

HON. KEN SCHUBERT (Chapter 360, Involuntary Treatment—Mental Illness), King County Superior Court, Seattle

ANDREW SIMONS (Chapter 155, Workers' Compensation), Attorney, Seattle

SHANNON E. SMITH (Chapter 310, Consumer Protection Actions), Attorney, Seattle

ERICK SPENCER (Chapter 360, Involuntary Treatment—Mental

Illness), Attorney, Seattle

REBECCA M. VASQUEZ (Chapter 360, Involuntary Treatment—Mental Illness), Attorney, Seattle

MARISA L. VELLING (Part X-A, Eminent Domain), Attorney, Seattle

ANDREA R. VITALICH (Chapter 365, Involuntary Treatment —Sexually Violent Predators), Attorney, Seattle

JESSE ANDREW WING (Chapter 330, Employment Discrimination), Attorney, Seattle

JACKLYNN A. ZORICH (Chapter 365, Involuntary Treatment —Sexually Violent Predators), Attorney, Seattle

PREFACE

The Washington Pattern Jury Instructions (WPI) Committee operates under the auspices of the Washington Supreme Court, which appoints WPI Committee members from nominees submitted by the Superior Court Judges' Association, District and Municipal Court Judges' Association, Washington State Bar Association, Washington Association of Prosecuting Attorneys, Washington Defenders' Association, Washington Association of Criminal Defense Lawyers, Washington State Association for Justice, Washington Defense Trial Lawyers, University of Washington School of Law, Seattle University School of Law, Gonzaga University School of Law, and the Administrative Office of the Courts. The Supreme Court also provides oversight of the WPI Committee's financial affairs. While often commending the WPI Committee's work to the bench and bar, the Court does not review the instructions in advance of its case-by-case consideration of them.

In an effort to keep our instructions as current as possible, the WPI Committee often publishes updates when we have finished a suitable group of chapters, rather than holding an update until we have completed our review of an entire volume. For this reason, the instructions are not all current as of the same date. Readers should carefully note the currency date of a particular instruction when researching for any subsequent changes in the law. The seventh edition includes new and revised instructions that were first published in either the 2013 Supplement or the 2017–2018 Supplement to the sixth edition of the civil pattern jury instructions.

New and revised instructions for WPI Chapters 107 (Legal Malpractice), 165 (Negligent Misrepresentation), 310 (Consumer Protection Actions), 320 (Insurance Bad Faith Actions), 340 (Civil Rights—General introductory Instructions), 341 (Civil Rights—Municipal and Local Government Liability), 342 (Civil Rights—Fourth Amendment—Unreasonable Search and Seizure), and 348 (Civil Rights—Damages and Verdict Forms) were included in the 2013 Supplement. New and revised instructions for WPI Chapters 110 (Product Liability), 150 (Eminent Domain—General Instruc-

tions), 151 (Eminent Domain—Special Instructions), 155 (Workers' Compensation), 330 (Employment Discrimination), 360 (Involuntary Treatment—Mental Illness), 365 (Involuntary Treatment—Sexually Violent Predators), and 380 (Nuisance) were included in the 2017-2018 Supplement.

We would like to thank each of the WPI Committee members, and our staff attorney, Lynne Alfasso, for their countless hours of work, their dedication, and their inspired contributions toward improving the law. We also wish to thank the other members of the bench and bar who served on subcommittees focusing on particular specialized areas of the law. Their contributions greatly improve our work. The WPI Committee also thanks attorney Ashleigh B. Rhodes for her assistance with research on implicit bias in civil proceedings.

The WPI Committee dedicates the seventh edition of the civil pattern jury instructions to Richard F. Neidhardt. From 1999 to 2013, Mr. Neidhardt served as the Reporter and Counsel for the WPI Committee and made significant contributions to the pattern jury instructions and other projects of the WPI Committee designed to improve the administration of justice and the jury system. In 2013, the Washington Supreme Court appointed Mr. Neidhardt to the position of Reporter of Decisions for the Supreme Court, a role in which he served with distinction until his death in 2018.

HONORABLE HELEN L. HALPERT (Ret.), CO-CHAIR

HONORABLE LINDA C. KRESE, CO-CHAIR

THOMSON REUTERS

WESTLAW™

MOST PREFERRED ONLINE LEGAL RESEARCH SERVICE

Thomson Reuters Westlaw has been voted the #1 Best Online Legal Research vendor year-after-year by industry professionals. That's because we continually invest more than any other online legal research provider in our people and technology where it matters most. As a result, you find exactly what you need quickly and confidently.

- Build the strongest argument with the most comprehensive collection of legal content
- Deliver better results confidently with WestSearch®, the only search engine designed specifically for the law
- Rely on the most current version of the law with proprietary editorial enhancements
- Access your legal research anytime, anywhere with the free Westlaw apps

LEARN MORE: https://legal.thomsonreuters.com
SIGN ON: westlaw.com
24/7 REFERENCE ATTORNEYS: 1-800-REF-ATTY (733-2889)

THOMSON REUTERS PROVIEW™

This title is one of many now available on your tablet as an eBook.

Take your research mobile. Powered by the Thomson Reuters ProView™ app, our eBooks deliver the same trusted content as your print resources, but in a compact, on-the-go format.

ProView eBooks are designed for the way you work. You can add your own notes and highlights to the text, and all of your annotations will transfer electronically to every new edition of your eBook.

You can also instantly verify primary authority with built-in links to WestlawNext® and KeyCite®, so you can be confident that you're accessing the most current and accurate information.

To find out more about ProView eBooks and available discounts, call 1-800-344-5009.

RELATED PRODUCTS

WASHINGTON PRACTICE SERIES™

Methods of Practice
Cheryl C. Mitchell and Ferd H. Mitchell

Rules Practice
Karl B. Tegland

Evidence Law and Practice
Karl B. Tegland

Courtroom Handbook on Washington Evidence
Karl B. Tegland

Washington Pattern Jury Instructions—Civil
Washington Supreme Court Committee on Jury Instructions

Civil Jury Instruction Handbook
David K. DeWolf

Uniform Commercial Code Forms
Warren L. Shattuck and Richard Cosway

Civil Procedure Forms and Commentary
David E. Breskin

Washington Pattern Jury Instructions—Criminal
Washington Supreme Court Committee on Jury Instructions

Criminal Jury Instruction Handbook
Seth A. Fine

Criminal Practice and Procedure with Forms
Royce A. Ferguson, Jr.

Criminal Law with Sentencing Forms
Seth A. Fine

Civil Procedure
Douglas J. Ende

Washington Handbook on Civil Procedure

Douglas J. Ende

Tort Law and Practice
David K. DeWolf and Keller W. Allen

Real Estate—Transactions and Property Law
William B. Stoebuck and John W. Weaver

Family and Community Property Law with Forms
Scott Horenstein

Family and Community Property Law Handbook
Scott Horenstein

Environmental Law and Practice
Timothy H. Butler

Contract Law and Practice
David K. DeWolf, Keller W. Allen, and Darlene Barrier Caruso

Washington Elder Law and Practice: Basic to Advanced
Cheryl C. Mitchell and Ferd H. Mitchell

Washington Elder Law Handbook
Cheryl C. Mitchell and Ferd H. Mitchell

Probate Law and Practice with Forms
Cheryl C. Mitchell and Ferd H. Mitchell

Creditors Remedies—Debtors' Relief
Marjorie Dick Rombauer

Washington Elements of an Action
David K. DeWolf

Washington Motions in Limine
David Finley and Lisa McGuire

Washington Business Law
Dale L. Carlisle and Brooke A. Johnson

Washington DUI Practice Manual
Linda M. Callahan

Construction Law Manual

Washington Summary Judgment and Related Termination Motions

Julie Kay Baker

Washington Insurance Law and Litigation
David K. DeWolf and Matt Albrecht

Washington Land Use
Michael F. Connelly

Thomson Reuters thanks you for subscribing to this product. Should you have any questions regarding this product please contact Customer Service at 1-800-328-4880 or by fax at 1-800-340-9378. If you would like to inquire about related publications or place an order, please contact us at 1-800-344-5009.

Thomson Reuters
610 Opperman Drive
Eagan, MN 55123

https://legal.thomsonreuters.com/

SUMMARY OF CONTENTS

Volume 6

PART I GENERAL INSTRUCTIONS

Chapter		Page
0	Introduction to Washington's Pattern Jury Instructions for Civil Cases	1
1	Introductory and General	7
2	Credibility of Witnesses, Weight of Testimony, and Other Evidence	49
3	Impeachment	63
4	Admissions	67
5	Failure to Testify or Produce Evidence	69
6	Oral Instructions During Trial	71

PART II NEGLIGENCE—RISK—MISCONDUCT—PROXIMATE CAUSE

10	Negligence and Ordinary Care	125
11	Contributory Negligence and Imputed Negligence	135
12	Specific Factors Affecting Negligence and Contributory Negligence	149
13	Assumption of Risk	165
14	Willful and Wanton Misconduct and Tort of Outrage	179
15	Proximate Cause	193
16	Defenses	211

PART III ISSUES—BURDEN OF PROOF

20	Issues in the Case	225
21	Burden of Proof	235
22	Burden of Proof—Res Ipsa Loquitur	259
23	Admitted Liability	265
24	Presumptions	269

PART IV DAMAGES

30	Personal and Property Damages	279
31	Damages—Wrongful Death and Survival Actions	333
32	Damages—Injury to Spouse, Domestic Partner, Parent, or Child	371

Chapter		Page
33	Damages—Mitigation—Avoidable Consequences	383
34	Damages—Future—Mortality Tables	391
35	Exemplary Damages	399
	PART V MULTIPLE PARTIES AND PLEADINGS—FORMS OF VERDICTS	
41	Multiple Parties and Pleadings	401
45	Forms of Verdicts	411
	PART VI AGENCY AND PARTNERSHIP—TORTS	
50	Agency and Partnership—Torts	463
	PART VII STATUTORY VIOLATIONS	
60	Statutory Violations	503
	PART VIII MOTOR VEHICLES	
70	Motor Vehicles	515
71	Emergency and Roadwork Vehicles	553
72	Guest-Passenger—Joint Venture—Family Car	563
73	Motor Vehicles—Railroad Crossings	571
	PART IX PARTICULARIZED STANDARDS OF CONDUCT	
100	Common Carriers	573
105	Health Care	595
107	Legal Malpractice	635
110	Product Liability	669
	PART X OWNERS AND OCCUPIERS OF LAND	
120	Trespasser—Licensee—Social Guest—Invitee	769
130	Landlord and Tenant	805
135	Abutting Property Owner	825
140	Governmental Entities	829
	Volume 6A	
	PART X-A EMINENT DOMAIN	
150	Eminent Domain—General Instructions	1
151	Eminent Domain—Special Instructions	39
	PART XI WORKERS' COMPENSATION	
155	Workers' Compensation	61

SUMMARY OF CONTENTS

Chapter		Page
	PART XII FRAUD	
160	Fraud	115
165	Negligent Misrepresentation	123
	PART XIII CONTRACTS	
300	Contracts—Issues—Burden of Proof	149
301	Contracts—Formation, Interpretation, and Enforceability	163
301A	Equitable Alternatives—Promissory Estoppel and Quasi Contract	195
302	Contracts—Performance and Breach	205
303	Contracts—Remedies	235
	PART XIV CONSUMER PROTECTION	
310	Consumer Protection Actions	259
	PART XV INSURANCE BAD FAITH	
320	Insurance Bad Faith Actions	285
	PART XVI EMPLOYMENT	
330	Employment Discrimination	313
	PART XVII CIVIL RIGHTS	
340	Civil Rights—General Introductory Instructions	411
341	Civil Rights—Municipal and Local Government Liability	441
342	Civil Rights—Fourth Amendment—Unreasonable Search and Seizure	455
343	Civil Rights—Conditions of Confinement	481
348	Civil Rights—Damages and Verdict Forms	511
	PART XVIII COMMERCIAL LITIGATION	
351	Trade Secrets	525
352	Tortious Interference With Economic Relations	545
	PART XIX INVOLUNTARY TREATMENT	
360	Mental Illness	569
365	Involuntary Treatment—Sexually Violent Predators	631
	PART XX ALCOHOL LIABILITY	
370	Liability for Furnishing Alcohol	701
	PART XXI NUISANCE	
380	Nuisance	735

Chapter Page

Appendices

A.	A Juror's Guide	753
B.	Life Expectancy Table	754
C.	The Civil Jury Trial	759
D.	Suggested Combinations of Instructions	760
E.	Illustrative Sets of Instruction	767
F.	Language Interpreters in Trials	781
G.	Selected Recommendations From the Washington State Jury Commission	782
H.	Consumer Protection Act *Per Se* Violations	798

Table of Laws and Rules ..... Tbl of L&R-1

Table of Cases ..... Tbl of Cases-1

Index Index-1

TABLE OF CONTENTS

PART X-A EMINENT DOMAIN

WPI		Page
CHAPTER 150 EMINENT DOMAIN—GENERAL INSTRUCTIONS		
150.00	Introduction	2
150.01	Advance Oral Instruction—Beginning of Proceedings	4
150.02	Issues	6
150.03	Sole Issue Just Compensation	7
150.04	Burden of Proof	8
150.05	Measure of Compensation—Total Taking	9
150.06	Measure of Compensation—Partial Taking	12
150.06.01	Measure of Compensation—Easement	16
150.06.02	Just Compensation—Temporary Occupancy	18
150.07	Measure of Compensation—Partial Taking—Benefits	20
150.07.01	What Benefits May Be Offset	23
150.08	Fair Market Value—Definition	24
150.09	Uses	25
150.10	Factors—Partial Taking	26
150.11	Factors—Remote and Speculative	27
150.12	View	28
150.13	Agency Plans—Partial Taking	30
150.14	Manner of Construction and Use—Partial Taking	31
150.15	Witnesses—Opinions—Just Compensation	32
150.16	Concluding Instruction	34
150.17	Verdict Form—Condemnation	37
CHAPTER 151 EMINENT DOMAIN—SPECIAL INSTRUCTIONS		
151.01	Access, Light, View, and Air—Abutting Public Way	39
151.02	Access, Light, View, and Air—Measure of Compensation	42

WPI		Page
151.03	Access—Diversion of Traffic	43
151.04	Circuity of Travel to and From Property	44
151.05	Business Income—Profits	46
151.06	Costs—Purchase Price	48
151.07	Costs—Reproduction or Replacement	49
151.08	Costs—Repairs to Remainder	50
151.09	Offers	51
151.10	Plans of Owner	52
151.11	Platting	53
151.12	Sales—Comparables	55
151.13	Sales to Condemnor	56
151.14	Value to Condemnor	57
151.15	Zoning	58

PART XI WORKERS' COMPENSATION

CHAPTER 155 WORKERS' COMPENSATION

155.00	Introduction	62
155.01	Conclusion of Trial—Introductory Instruction	63
155.01.01	Evidence Limited to Record	67
155.02	Board's Findings	68
155.02.01	Issues	70
155.03	Burden of Proof	72
155.04	Explanation of the Industrial Insurance System	74
155.05	Negligence Not An Issue	76
155.06	Proximate Cause—Allowed Claim	77
155.06.01	Proximate Cause—Rejected Claim	80
155.06.02	Proximate Cause—Allowed Claim—Alternative	81
155.06.03	Proximate Cause—Rejected Claim—Alternative	82
155.07	Permanent Total Disability	83
155.07.01	Permanent Total Disability—Special Work	86
155.08	Permanent Partial Disability—Categories of Impairment	88
155.08.01	Permanent Partial Disability—No Categories of Impairment	91
155.09	Extent of Disability or Aggravation—Basis of Medical Opinion	93
155.10	Extent of Disability	94
155.11	Aggravation—Prior Award	95
155.11.01	Aggravation—Prior Award—Burden of Proof	96

WPI		Page
155.12	Aggravation—No Prior Award	98
155.12.01	Burden of Proof—Aggravation—No Prior Award	99
155.13	Weighing Medical and Lay Testimony	101
155.13.01	Testimony of Attending Physician	102
155.14	Special Verdict—Workers' Compensation	103
155.20	Lighting Up of Pre-Existing, Asymptomatic Condition	105
155.21	Worsening of Pre-Existing, Symptomatic Condition	107
155.25	Injury to Particular Worker	109
155.30	Occupational Disease—Definition	111
155.31	Treatment—Definition	112

PART XII FRAUD

CHAPTER 160 FRAUD

160.01	Elements of Fraud	115
160.02	Fraud—Burden of Proof	117
160.03	Fraud—Burden of Proof—Combined With Preponderance of Evidence	119
160.04	Fraud—Burden of Proof on the Issues	121

CHAPTER 165 NEGLIGENT MISREPRESENTATION

165.00	Negligent Misrepresentation—Introduction	123
165.01	Negligent Misrepresentation—Affirmative Misstatement—Burden of Proof on the Issues	127
165.02	Negligent Misrepresentation—Failure to Disclose Information—Burden of Proof on the Issues	131
165.03	Negligent Misrepresentation—Failure to Disclose Information—Duty to Disclose	134
165.03.01	Duty to Disclose—Mixed Issues of Fact and Law	138
165.03.02	Duty to Disclose—Mixed Issues of Fact and Law—Special Verdict Form	140
165.04	Negligent Misrepresentation—Failure to Disclose Information—Fiduciary Relationship—Relationship of Trust and Confidence—Definitions	142
165.05	Negligent Misrepresentation—Clear, Cogent, and Convincing Evidence	144

WPI | Page

165.06 Negligent Misrepresentation—Clear, Cogent, and Convincing Evidence—Combined With Preponderance of Evidence 146

PART XIII CONTRACTS

CHAPTER 300 CONTRACTS—ISSUES—BURDEN OF PROOF

300.00 Introduction 149
300.01 Issues—Breach of Contract—Damages 151
300.01.01 Issues—Contract—Alternative 154
300.02 Burden of Proof on the Issues—Breach of Contract—No Affirmative Defense 155
300.03 Burden of Proof on the Issues—Breach of Contract—With Affirmative Defenses 159

CHAPTER 301 CONTRACTS—FORMATION, INTERPRETATION, AND ENFORCEABILITY

301.01 Contract Defined 163
301.02 Promise Defined 165
301.03 Mutual Assent 168
301.04 Consideration 170
301.05 Contract Interpretation 172
301.06 Parol Evidence 175
301.07 Contract Modification 178
301.08 Enforceability—Mutual Mistake 181
301.09 Enforceability—Unilateral Mistake 185
301.10 Enforceability—Duress 189
301.11 Enforceability—Undue Influence 192

CHAPTER 301A EQUITABLE ALTERNATIVES—PROMISSORY ESTOPPEL AND QUASI CONTRACT

301A.01 Promissory Estoppel 195
301A.02 Quasi Contract 202

CHAPTER 302 CONTRACTS—PERFORMANCE AND BREACH

302.01 Breach of Contract—Non-Performance of Duty 205

WPI		Page
302.02	Conditions Precedent or Conditions Concurrent	207
302.03	Material Breach—Definition	212
302.04	Excuse of Performance—Anticipatory Breach	215
302.05	Elements of Equitable Estoppel	217
302.06	Excuse of Performance—Estoppel	220
302.07	Excuse of Performance—Waiver	222
302.08	Excuse of Performance—Interference With Contractual Performance	226
302.09	Excuse of Performance—Impossibility or Impracticability	228
302.10	Excuse of Performance—Frustration of Purpose	231
302.11	Implied Duty of Good Faith and Fair Dealing	233

CHAPTER 303 CONTRACTS—REMEDIES

303.01	Measure of Expectation Damages—Breach of Contract—No Counterclaim	235
303.02	Measure of Expectation Damages—Breach of Contract—Counterclaim	240
303.03	Contract—Measure of Damages—Direct Damages—Special Cases	243
303.04	Contract—Damages—Lost Profits	246
303.05	Contract—Reliance Damages	249
303.06	Contract—Mitigation of Damages	251
303.07	Contract—Liquidated Damages	253
303.08	Contract—Damages—Restitution	255

PART XIV CONSUMER PROTECTION

CHAPTER 310 CONSUMER PROTECTION ACTIONS

310.00	Consumer Protection Act—Introduction	259
310.01	Elements of a Violation of the Consumer Protection Act	262
310.02	Reasonableness Defense to Consumer Protection Act Claim	265
310.03	*Per Se* Violation of Consumer Protection Act	267
310.04	Public Interest Element	269
310.05	Public Interest Element in Private Disputes	271
310.06	Injury in Consumer Protection Act Claim	272
310.07	Causation in Consumer Protection Act Claim	275

WPI		Page
310.08	Definition—Unfair or Deceptive Act or Practice	279
310.09	Definition—Trade or Commerce	283

PART XV INSURANCE BAD FAITH

CHAPTER 320 INSURANCE BAD FAITH ACTIONS

320.00	Introduction	285
320.01	Insurer's Failure to Act in Good Faith—Burden of Proof—General	290
320.01.01	Insurer's Failure to Act in Good Faith—Burden of Proof—General—Third-Party Claims	292
320.02	Insurer's Duty of Good Faith—General Duty	294
320.03	Insurer's Failure to Act in Good Faith in Defending Subject to a Reservation of Rights	296
320.04	Insurer's Failure to Act in Good Faith—Denial of First-Party Claims	299
320.05	Insurer's Failure to Act in Good Faith—Failure to Investigate and Explore Settlement	301
320.06	Violations of Insurance Regulations Related to Settlement of Claims	304
320.06.01	Insurance Fair Conduct Act	309
320.07	Special Verdict Form—Insurer's Failure to Act in Good Faith	311

PART XVI EMPLOYMENT

CHAPTER 330 EMPLOYMENT DISCRIMINATION

330.00	Employment discrimination—Introduction	314
330.01	Employment Discrimination—Disparate Treatment—Burden of Proof	322
330.01.01	Employment Discrimination—Disparate Treatment—Burden of Proof—Substantial Factor	327
330.01.02	Employment Discrimination—Disparate Treatment—Adverse Employment Action—Definition	328
330.02	Employment Discrimination—Disparate Impact—Business Necessity—Definition	330
330.03	Employment Discrimination—Disparate Impact—Business Necessity—Burden of Proof	333

TABLE OF CONTENTS

WPI		Page
330.04	Employment Discrimination—Bona Fide Occupational Qualification (BFOQ) Defense	337
330.05	Employment Discrimination—Retaliation	339
330.06	Retaliation—Adverse Employment Action—Definition	343
330.21	Workplace Harassment—General	345
330.22	Sexual Harassment—Quid Pro Quo—Burden of Proof	347
330.23	Workplace Harassment—Hostile Work Environment—Burden of Proof	350
330.24	Harassment—Hostile Work Environment—"Manager" and "Management"—Definitions	354
330.31	Disability Discrimination—Definition of Disability—Disparate Treatment Cases	355
330.31.01	Disability Discrimination—Definition of Impairment	357
330.32	Disability Discrimination—Treatment—Burden of Proof	359
330.33	Disability Discrimination—Reasonable Accommodation—Burden of Proof	364
330.34	Disability Discrimination—Reasonable Accommodation—Definition	368
330.35	Disability Discrimination—Reasonable Accommodation—Employer Notice and Employee's Duty to Cooperate	372
330.36	Disability Discrimination—Undue Hardship	373
330.37	Essential Function—Definition	375
330.40	Discrimination Based on Religion or Creed—Failure to Accommodate—Definition	377
330.41	Discrimination Based on Religion or Creed—Reasonable Accommodation—Burden of Proof	379
330.42	Discrimination Based on Religion or Creed—Failure to Accommodate—Defense and Undue Hardship	381
330.50	Wrongful Termination in Violation of Public Policy	384
330.51	Wrongful Termination in Violation of Public Policy—Burden of Proof	386
330.52	Wrongful Termination in Violation of Public Policy—Constructive Discharge—Burden of Proof	389
330.81	Damages—Economic and Non-Economic—No After-Acquired Evidence	392

WPI		Page
330.81.01	Damages—Economic and Non-Economic—After-Acquired Evidence	396
330.81.02	Damages—After-Acquired Evidence	399
330.82	Damages—Employment Discrimination—Future Lost Earnings (Front Pay)	401
330.83	Damages—Mitigation—Wage Loss	403
330.90	Employee Versus Independent Contractor (Minimum Wage Act)	405
330.91	Joint Employer Status (Minimum Wage Act)	407

PART XVII CIVIL RIGHTS

CHAPTER 340 CIVIL RIGHTS—GENERAL INTRODUCTORY INSTRUCTIONS

340.00	Civil Rights—Introduction	412
340.01	Claims Instruction for Section 1983 Cases	417
340.02	Civil Rights—Individual Defendant—Burden of Proof on the Issues	424
340.03	Civil Rights—"Under Color of Law"—Definition	428
340.04	Civil Rights—"Subjects" and "Causes to Be Subjected"—Definition	430
340.05	Civil Rights—Failure to Train or Inadequate Training—Municipal Liability—"Deliberate Indifference"—Definition	432
340.06	Civil Rights—Causation—Comment Only	433

CHAPTER 341 CIVIL RIGHTS—MUNICIPAL AND LOCAL GOVERNMENT LIABILITY

341.01	Civil Rights—Municipal and Local Government Liability—General Introductory Instruction	441
341.02	Civil Rights—Municipal and Local Government Liability—Failure to Train, Supervise, or Instruct—Burden of Proof	445
341.03	Civil Rights—Municipal and Local Government Liability—Policy or Custom Inferred From Ratification of Conduct	449
341.04	Civil Rights—Failure to Train or Inadequate Training—Municipal Liability—"Deliberate Indifference"—Definition	450

WPI Page

CHAPTER 342 CIVIL RIGHTS—FOURTH AMENDMENT—UNREASONABLE SEARCH AND SEIZURE

342.01 Unreasonable Force—Fourth Amendment—Burden of Proof on the Issues 455
342.02 Definition of "Seizure" of a Person—Fourth Amendment 458
342.03 Definition of Unreasonable Force—Fourth Amendment 459
342.04 Unreasonable Search—Burden of Proof on the Issues 464
342.05 Unreasonable Search—Exceptions to Warrant Requirement—Search Incident to Lawful Arrest ... 468
342.06 Unreasonable Search—Exceptions to Warrant Requirement—Consent 472
342.07 Unreasonable Search—Exceptions to Warrant Requirement—Exigent Circumstances 474
342.08 Unlawful Arrest/Seizure of Person—Fourth Amendment—Exception to Warrant Requirement—Probable Cause to Believe Crime Committed 476
342.09 Unlawful Arrest/Seizure of Person—Fourth Amendment—Exception to Warrant Requirement—Probable Cause—Considerations.... 477
342.10 Unlawful Seizure of Person—Fourth Amendment—Exception to Warrant Requirement—Reasonable Suspicion for Investigatory Stop 479

CHAPTER 343 CIVIL RIGHTS—CONDITIONS OF CONFINEMENT

343.00 Introduction—Conditions of Confinement—Eighth Amendment and Fourteenth Amendment 481
343.01 General Conditions of Confinement—Eighth Amendment—Burden of Proof on the Issues 487
343.02 Conditions of Confinement—Eighth Amendment—Deliberate Indifference—General Conditions of Confinement 490
343.03 Conditions of Confinement/Medical Care—Eighth Amendment—Burden of Proof on the Issues 492
343.04 Conditions of Confinement—Eighth Amendment—Deliberate Indifference—Medical 495

WPI		Page
343.05	Conditions of Confinement/Failure to Protect—Eighth Amendment—Burden of Proof on the Issues	498
343.06	Conditions of Confinement—Eighth Amendment—Deliberate Indifference—Failure to Protect	501
343.07	Conditions of Confinement/Failure to Protect—Fourteenth Amendment—Burden of Proof on the Issues	503
343.08	Conditions of Confinement—Eighth Amendment—Excessive Force—Burden of Proof on the Issues	506

CHAPTER 348 CIVIL RIGHTS—DAMAGES AND VERDICT FORMS

348.01	Civil Rights—Compensatory Damages (Reserved)	511
348.02	Civil Rights—Punitive Damages—Individual Defendant	512
348.10	Civil Rights—Fourth Amendment—Unreasonable Force—No Punitive Damages—Individual Defendant—Special Verdict Form	515
348.11	Civil Rights—Fourth Amendment—Unreasonable Force—Punitive Damages—Individual Defendant—Special Verdict Form	518
348.12	Civil Rights—Municipal Liability—Fourth Amendment—Unreasonable Force—No Punitive Damages—Special Verdict Form	521

PART XVIII COMMERCIAL LITIGATION

CHAPTER 351 TRADE SECRETS

351.01	Trade Secrets—Burden of Proof	525
351.02	Trade Secret—Definition	531
351.03	Misappropriation—Definition	534
351.04	Improper Means—Definition	536
351.05	Independent Economic Value—Definition	537
351.06	Readily Ascertainable—Definition	540
351.07	Reverse Engineering—Definition	541
351.08	Reasonable Efforts to Maintain Secrecy—Definition	542

WPI Page

CHAPTER 352 TORTIOUS INTERFERENCE WITH ECONOMIC RELATIONS

352.01 Tortious Interference With Contract—Burden of Proof on the Issues—No Affirmative Defense.... 545
352.01.01 Tortious Interference With Contract—Burden of Proof on the Issues—With Affirmative Defenses..... 550
352.02 Tortious Interference With Business Expectancy—Burden of Proof on the Issues—No Affirmative Defense..... 553
352.02.01 Tortious Interference With Business Expectancy—Burden of Proof on the Issues—With Affirmative Defenses..... 556
352.03 Tortious Interference—Improper Purpose—Improper Means—Definitions..... 558
352.04 Tortious Interference With Contract—Affirmative Defense—Legally Protected Interest..... 562
352.05 Tortious Interference With Business Expectancy—Affirmative Defense—Competition..... 565
352.06 Tortious Interference With Business Expectancy—Affirmative Defense—Financial Interest..... 567

PART XIX INVOLUNTARY TREATMENT

CHAPTER 360 MENTAL ILLNESS

360.00 Introduction..... 570
360.01 Advance Oral Instruction—Mental Illness—Involuntary Treatment—Introductory..... 571
360.02 Conclusion of Trial—Introductory Instruction—Mental Illness—Involuntary Treatment..... 586
360.03 Mental Illness—Involuntary Treatment—Explanation..... 590
360.04 Mental Illness—Involuntary Treatment—90 Days..... 591
360.05 Mental Illness—Involuntary Treatment—180 Days..... 594
360.05.01 Likelihood of Repeating Similar Acts—Factors.... 599
360.05.02 Less Restrictive Alternative—Mental Illness—Involuntary Treatment..... 600

WPI		Page
360.05.03	In Need of Assisted Outpatient Treatment—Definition	601
360.06	Burden of Proof—Mental Illness—Involuntary Treatment	603
360.10	Mental Disorder—Definition Mental Disorder Means Any Organic, Mental, or Emotional Impairment That Has Substantial Adverse Effects on the Individual's Cognitive or Volitional Functions	605
360.11	Custody—Mental Illness—Definition	606
360.12	Gravely Disabled—Mental Illness—Definition	607
360.13	Likelihood of Serious Harm—Mental Illness—Definition	609
360.13.01	Overt Act—Recent—History of Violent Acts—Violent Act—Definitions	611
360.14	Mental Illness—Respondent's Failure to Testify	613
360.15	Mental Illness—Expert Testimony—Limitation on Consideration of Evidence	614
360.20	Concluding Instruction—Mental Illness—Involuntary Treatment	616
360.21	Special Verdict Form [A] (90 Days)—Mental Illness—Involuntary Treatment	620
360.22	Special Verdict Form [A] (180 Days)—Mental Illness—Involuntary Treatment	624
360.23	Special Verdict Form [B]—Mental Illness—Involuntary Treatment—in Need of Assisted Outpatient Treatment	628

CHAPTER 365 INVOLUNTARY TREATMENT—SEXUALLY VIOLENT PREDATORS

365.00	Introduction	632
365.01	Sexually Violent Predators—Initial Commitment Advance Oral Instruction—Voir Dire	636
365.02	Sexually Violent Predators—Conclusion of Trial—Introductory Instruction	650
365.03	Basis of Expert Opinion—Limiting Instruction	654
365.04	Opinion Testimony—Limitation on Consideration of Evidence	656
365.10	Sexually Violent Predators—Elements for Commitment	657
365.11	Sexually Violent Predators—Reasonable Doubt—Definition	661

WPI		Page
365.12	Sexually Violent Predators—Mental Abnormality—Definition	663
365.12.01	Personality Disorder—Definition	664
365.13	Sexually Violent Predators—Predatory—Definition	665
365.14	Sexually Violent Predators—Likely to Engage—Definition	666
365.15	Sexually Violent Predators—Recent Overt Act—Definition	668
365.16	Sexually Violent Predators—Sexual Violence—Definition	669
365.20	Sexually Violent Predators—Concluding Instruction	672
365.21	Sexually Violent Predators—Initial Commitment—Verdict Form	675
365.30	Sexually Violent Predators—Conditional Release (LRA)—Unconditional Discharge—Advance Oral Instruction—Voir Dire	676
365.31	Sexually Violent Predators—Conditional Release / Less Restrictive Alternative Placement (LRA)—Elements	690
365.32	Sexually Violent Predators—Conditional Release / Less Restrictive Alternative Placement (LRA)—Definition of "Less Restrictive Alternative"	693
365.33	Sexually Violent Predators—Reasonable Doubt—Less Restrictive Alternative Trial (LRA) / Conditional Release	694
365.34	Sexually Violent Predators—Unconditional Discharge Trial—Elements	695
365.35	Sexually Violent Predators—Reasonable Doubt—Unconditional Discharge Trial—Definition	697
365.36	Sexually Violent Predators—Verdict Form—Unconditional Discharge	698
365.37	Sexually Violent Predators—Verdict Form—Conditional Release—LRA	699

PART XX ALCOHOL LIABILITY

CHAPTER 370 LIABILITY FOR FURNISHING ALCOHOL

370.01	Furnishing Alcohol—Person Apparently Under the Influence of Alcohol or Obviously	

WPI		Page
	Intoxicated Person—Duty	725
370.01.01	Furnishing Alcohol—Person Apparently Under the Influence of Alcohol—Definition	707
370.02	Furnishing Alcohol—Obviously Intoxicated Person—Definition	709
370.03	Furnishing Alcohol—Person Apparently Under the Influence of Alcohol or Obviously Intoxicated Person—Burden of Proof	712
370.04	Furnishing Alcohol—Obviously Intoxicated Person—Assault	714
370.05	Furnishing Alcohol—Obviously Intoxicated Person—Assault—Burden of Proof	715
370.06	Commercial Vendor—Quasi-Commercial Host—Definitions	718
370.07	Furnishing Alcohol to Minors—Duty of Commercial Vendor	719
370.08	Furnishing Alcohol to Minors—Commercial Vendor—Burden of Proof	723
370.09	Furnishing Alcohol to Minors—Commercial Vendor—Minor Transferee	725
370.10	Furnishing Alcohol to Minors—Commercial Vendor—Minor Transferee—Burden of Proof	727
370.11	Furnishing Alcohol to Minors—Commercial Vendor—Certification Card Defense	729
370.12	Furnishing Alcohol to Minors—Duty of Social Host	731
370.13	Furnishing Alcohol to Minors—Social Host—Burden of Proof	734

PART XXI NUISANCE

CHAPTER 380 NUISANCE

380.00	Introduction	735
380.01	Nuisance in General—Definition	739
380.01.01	Nuisance—Example of Modified Definition—Interference With Use of Street or Highway	741
380.02	Public/Private Nuisance—Definition	743
380.03	Nuisance—Balancing Test	744
380.04	Nuisance Per Se	746
380.05	Nuisance—Burden of Proof—No Affirmative Defense	748

WPI Page

380.06 Nuisance—Burden of Proof—Assumption of Risk Defense (Coming to the Nuisance) 750

Appendices

A. A Juror's Guide 753
B. Life Expectancy Table 754
C. The Civil Jury Trial 759
D. Suggested Combinations of Instructions 760
E. Illustrative Sets of Instruction 767
F. Language Interpreters in Trials 781
G. Selected Recommendations From the Washington State Jury Commission 782
H. Consumer Protection Act *Per Se* Violations .. 798

Table of Laws and Rules ..... Tbl of L&R-1

Table of Cases ..... Tbl of Cases-1

Index Index-1

PART X-A

EMINENT DOMAIN

CHAPTER 150 EMINENT DOMAIN—GENERAL INSTRUCTIONS

CHAPTER 151 EMINENT DOMAIN—SPECIAL INSTRUCTIONS

CHAPTER 150

EMINENT DOMAIN—GENERAL INSTRUCTIONS

WPI 150.00	Introduction
WPI 150.01	Advance Oral Instruction—Beginning of Proceedings
WPI 150.02	Issues
WPI 150.03	Sole Issue Just Compensation
WPI 150.04	Burden of Proof
WPI 150.05	Measure of Compensation—Total Taking
WPI 150.06	Measure of Compensation—Partial Taking
WPI 150.06.01	Measure of Compensation—Easement
WPI 150.06.02	Just Compensation—Temporary Occupancy
WPI 150.07	Measure of Compensation—Partial Taking—Benefits
WPI 150.07.01	What Benefits May Be Offset
WPI 150.08	Fair Market Value—Definition
WPI 150.09	Uses
WPI 150.10	Factors—Partial Taking
WPI 150.11	Factors—Remote and Speculative
WPI 150.12	View
WPI 150.13	Agency Plans—Partial Taking
WPI 150.14	Manner of Construction and Use—Partial Taking
WPI 150.15	Witnesses—Opinions—Just Compensation
WPI 150.16	Concluding Instruction
WPI 150.17	Verdict Form—Condemnation

WPI 150.00

INTRODUCTION

Eminent domain has been defined as "the inherent power of a governmental entity to take privately owned property . . . and convert it to public use." Condemnation is the judicial process by which this power is exercised. Black's Law Dictionary (10th ed. 2014). A restriction on the exercise of this power is that private property cannot be taken or damaged for public or private use "without just compensation having been first made, or paid into court for the user, . . . which compensation shall be ascertained by a jury, unless a jury be waived, as in other civil cases in courts of record in the manner prescribed by law." Const. art. I, § 16, amendment 9.

Although an attribute of sovereignty, the power of eminent domain is dependent upon legislative action establishing the situations in which, and the procedures by which, the power is to be exercised. City of Tacoma v. State, 4 Wash. 64, 29 P. 847 (1892). Statutes giving agencies the power to condemn and defining the purposes for which they may condemn, as well as the procedures to be followed, are numerous. These statutes can be found in RCW Title 8, including cross-references to additional statutes contained elsewhere in the code. Resort must be made to particular sections in deciding what instructions the jury should be given.

A taking or damaging of private property for public or private use without the payment of just compensation contrary to article I, section 16, amendment 9, of the Washington Constitution, creates a cause of action in the owner for the recovery of such compensation. Lewis v. City of Seattle, 5 Wash. 741, 32 P. 794 (1893); Brown v. City of Seattle, 5 Wash. 35, 31 P. 313 (1892). Such actions are often referred to as "reverse" or "inverse" condemnations. Substantive and procedural law applicable to such actions has no direct basis in statute, but is found in case law.

The bulk of the instructions contained in this chapter will be applicable to inverse as well as direct condemnation. An introductory instruction defining the issues can be patterned after WPI 20.01 (Issues). As there usually will be an issue of liability (i.e., whether there has been a taking or damaging of private property by the defendant) as well as compensation, instructions defining the elements of liability and burden of proof as well as those establishing the measure of compensation will be required.

For more detailed discussions of eminent domain law, see: Sackman, Nichols on The Law of Eminent Domain (rev. 3d ed.) (providing a

national perspective); Washington Real Property Deskbook, Chapter 13, Eminent Domain (Wash. St. Bar Assoc. (4th ed.); Stoebuck, 17 Washington Practice, Real Estate Property Law, Ch. 9 (2d ed.); Smith, Hansen, and Hiatt, Volume VII of Washington Lawyers Practice Manual, Chapter 23 Part 18 (2015 update).

[Current as of October 2016.]

WPI 150.01

ADVANCE ORAL INSTRUCTION—BEGINNING OF PROCEEDINGS

(Incorporate this instruction into WPI 1.01:)

This is a civil case by (name of agency) **against** (names of parties). **It arises out of an action started by** (name of agency) **to acquire** (describe property) **for public use. Such an action is called a condemnation action.**

Under our constitution, private property may not be taken or damaged for public use without the payment of just compensation. You are not to concern yourselves with the wisdom of (name of agency's) **project or the appropriateness of the acquisition involved in this action. The sole issue for your determination will be the just compensation to be paid by** (name of agency) **to** (name of owners, lenders, etc.).

NOTE ON USE

Give this instruction in every eminent domain action, including inverse condemnations. The instruction is to be incorporated into the judge's oral instruction given at the beginning of the trial, WPI 1.01 (Advance Oral Instruction—Beginning of Proceedings). The instruction may also be incorporated into WPI 1.02 (Conclusion of Trial—Introductory Instruction), if jurors might still be confused at the end of the trial as to the relationships among the parties.

For inverse condemnation cases, the instruction will need to be modified as to the alignment of the parties.

COMMENT

The instruction's second paragraph will assist the potential jurors in understanding the basic issues before jury selection begins. The paragraph is adapted from WPI 150.03 (Sole Issue Just Compensation). WPI 150.03 (Sole Issue Just Compensation) should still be included as part of the final written instructions.

See Comments to WPI 1.01 (Advance Oral Instruction—Beginning of Proceedings) and WPI 1.02 (Conclusion of Trial—Introductory Instruction).

[Current as of October 2016.]

WPI 150.02

ISSUES

This is an action brought by (name of agency) **for the purpose of acquiring certain [property] [and] [property rights] as described in evidence admitted in this case. [This property is] [These property rights are] sought by** (name of agency) **for** (nature of project)**. You are to decide the amount of just compensation to be paid by** (name of agency) **to** (name of owners, lenders, etc.)**.**

NOTE ON USE

Use bracketed material as applicable.

In an appropriate case, the particular rights being acquired may be stated in detail, rather than being referred to as "property" or "property rights."

In an inverse condemnation case, draft an appropriate instruction on issues and include instructions on burden of proof. See WPI Chapter 20 (Issues in the Case) and WPI Chapter 21 (Burden of Proof).

COMMENT

An earlier version of WPI 150.02 was approved in State v. Elder, 70 Wn.2d 414, 423 P.2d 533 (1967). The version approved in *Elder* is substantially the same as the current instruction.

The practice of giving an issues instruction stating the specific purpose for which the property was acquired was held not to be error in State v. Hobart, 5 Wn.App. 469, 487 P.2d 635 (1971).

[Current as of October 2016.]

WPI 150.03

SOLE ISSUE JUST COMPENSATION

Under our constitution, private property may not be taken or damaged for public use without the payment of just compensation. You are not to concern yourselves with the wisdom of (name of agency's) **project or the appropriateness of the acquisition involved in this action. Similarly, you are not to concern yourselves with** (name of owners') **moving costs, attorney fees, litigation expenses, or interest payments, as those items will be addressed in a separate proceeding.**

The sole issue for your determination is the just compensation to be paid by (name of agency) **to** (name of owners, lenders, etc.).

NOTE ON USE

Use this instruction in every condemnation trial, whether or not it was earlier read to the jury as part of the advance oral instruction, WPI 150.01. The instruction will require modification in an inverse condemnation case in which there is an issue of liability as well as compensation.

COMMENT

A similar instruction was approved in State v. Elder, 70 Wn.2d 414, 423 P.2d 533 (1967). Compensation for the items mentioned in the last sentence of the instruction's first paragraph is governed by RCW 8.25.070, RCW 8.25.075, RCW 8.26.010(5), RCW 8.26.035, and RCW 8.28.040. See, e.g., WAC Chapter 468-100 (addressing property acquisition by the Department of Transportation).

[Current as of October 2016.]

WPI 150.04

BURDEN OF PROOF

(No instruction on this subject should be given in a direct condemnation case. For inverse condemnation cases, see the Comment.)

COMMENT

In a direct condemnation action, after the condemning agency satisfies its burden of going forward with evidence of value, neither party has the burden of proof and no instruction should be given. State v. Amunsis, 61 Wn.2d 160, 377 P.2d 462 (1963). In an action in which the value of special benefits is an issue, the rule stated in *Amunsis* applies. State v. Templeman, 39 Wn.App. 218, 224, 693 P.2d 125 (1984). Nevertheless, the petitioner is accorded the right to open and close. State v. Washington Horse Breeders Ass'n, 64 Wn.2d 756, 394 P.2d 218 (1964).

In an inverse condemnation action, however, the burden of proof has been allocated between the condemning agency and the property owner as to particular issues. See, e.g., Kahuna Land Co. v. Spokane County, 94 Wn.App. 836, 841, 974 P.2d 1249 (1999) (property owner has burden of proving destruction of a fundamental attribute of property ownership); Burton v. Clark County, 91 Wn.App. 505, 516–17, 958 P.2d 343 (1998) (government has burden of proving a proper exercise of its police power, thereby justifying a taking). See also Keene Valley Ventures, Inc. v. City of Richland, 174 Wn.App. 219, 226, 298 P.3d 121 (property owner in an inverse condemnation case has burden of proving actual damages). Appropriate instructions in inverse condemnation cases may be adapted from the instructions in WPI Chapter 21 (Burden of Proof).

[Current as of October 2016.]

WPI 150.05

MEASURE OF COMPENSATION—TOTAL TAKING

Just compensation means the fair market value of the property. You are to consider, as part of the property, such improvements as have become permanently attached to the property and that affect its value. The fair market value is measured as of [(insert actual date of trial)**] [**(insert actual date of possession and use/agreed date of value)**]. You are not to consider any reduction or increase in the fair market value of the property caused by** (name of agency's) **project.**

NOTE ON USE

Use this instruction when total ownership is being acquired. For cases involving partial takings, instead use WPI 150.06 (Measure of Compensation—Partial Taking) or WPI 150.07 (Measure of Compensation—Partial Taking—Benefits).

Use the date of trial to measure fair market value if possession and use of the property has not been granted to petitioner prior to trial. If an order has previously been entered granting immediate possession and use of the property to petitioner prior to the date of trial or the date of value is otherwise not in dispute, insert the relevant date.

COMMENT

Market value. The market value of the property is the usual basis for compensation in a condemnation proceeding. Phillips v. King County, 136 Wn.2d 946, 956–57, 968 P.2d 871 (1998) (inverse condemnation case); City of Medina v. Cook, 69 Wn.2d 574, 418 P.2d 1020 (1966).

Cases sometimes refer to fair "cash" market value, although the term has not been consistently applied to the Washington cases. State v. Roth, 78 Wn.2d 711, 479 P.2d 55 (1971); City of Spokane v. Williams, 157 Wash. 120, 288 P. 258 (1930); King County v. Crawford & Conover, 92 Wash. 195, 158 P. 733 (1916); and Seattle & M.R. Co. v. Roeder, 30 Wash. 244, 70 P. 498 (1902). The problems that require the inclusion or exclusion of the word "cash" are usually associated with the presentation of evidence rather than jury instructions, and sufficient emphasis is given by the reference to "in cash" in WPI 150.08 (Fair Market Value—Definition).

Date of valuation. The date of valuation will usually be the date

of trial. State v. Williams, 68 Wn.2d 946, 416 P.2d 350 (1966). This is also true in an inverse condemnation case. Blankenship v. State, 160 Wash. 514, 295 P. 480 (1931). The general rule may be modified if using the trial date would be unfair under the facts of a particular case. Port of Seattle v. Equitable Capital Group, Inc., 127 Wn.2d 202, 898 P.2d 275 (1995) (affirming the trial court's use of the date on which the title passed to the condemnor) or if petitioner has obtained early possession and use of the property. See, generally Lange v. State, 86 Wn.2d 585, 590–93, 547 P.2d 282 (1976); Petition of City of Anacortes, 81 Wn.2d 166, 169, 500 P.2d 546 (1972); Consolidated Diking Imp. Dist. No. 3 v. Davis, 36 Wn.App. 125, 672 P.2d 414 (1983); State v. Buckley, 18 Wn.App. 798, 572 P.2d 730 (1977).

For condemnations by the State, see also RCW 8.04.092 (date of valuation is the date stated in the order granting possession and use, or if not stated, the date of entry of the order).

Impact of project not to be considered. The rule in Washington, as in most other jurisdictions, is that property taken in eminent domain must be valued without regard to the project for which it is taken. Washington's leading case is Pierce County v. Duffy, 104 Wash. 426, 176 P. 670 (1918).

Separate interests. In the usual case, the jury will return a lump sum verdict covering compensation for all persons owning an interest in the property as though all interests were owned by a single entity. See RCW 8.04.110. Under this approach, apportionment of the award among the several owners is handled by the judge at a subsequent proceeding not involving the condemnor. See RCW 8.04.140, 8.20.110; State v. Spencer, 90 Wn.2d 415, 583 P.2d 1201 (1978).

The timing of the apportionment, however, varies depending on the particular statutory scheme. For condemnation actions brought by the state, RCW Chapter 8.04 creates the two-step approach outlined above. RCW 8.04.110, 8.04.140; State v. Spencer, 90 Wn.2d at 418. Under these statutes, however, the judge may have discretion to forego the two-step approach and to instruct the jury to apportion the value among owners of different interests as part of their condemnation verdict. See State v. Higgins, 75 Wn.2d 110, 449 P.2d 393 (1969) (case involving leased lands).

Under separate statutes applying to other governmental entities, however, the jury hearing the condemnation action may return a verdict for each interest in the land. In this situation further instruction on the measure of compensation for each interest and modification of the verdict form will be required. See RCW 8.20.080 applying to corporations, and RCW 8.12.100, RCW 8.12.120, and RCW 8.12.150 applying to cities. The sections on city condemnations also apply to condemnation

by public utility districts (RCW 54.16.020), hospital districts (RCW 70.44.060), water-sewer districts (RCW 57.08.005), park districts (RCW 53.08.010), regional transit authorities (RCW 81.112.080), port districts (RCW 53.08.010 and RCW 53.25.190), and metropolitan districts (RCW 35.58.320).

[Current as of October 2016.]

WPI 150.06

MEASURE OF COMPENSATION—PARTIAL TAKING

Just compensation means the fair market value of the [property] [and] [property rights] acquired. The fair market value is measured as of [(insert actual date of trial)] [(insert actual date of possession and use/agreed date of value)]. In determining the fair market value of the [property] [and] [property rights], you are not to consider any reduction or increase in the fair market value of the property, before the acquisition, caused by (name of agency's) project. In determining the fair market value of the remaining property, after the acquisition, you are to consider the diminution of the fair market value, if any, of the remaining property caused by the acquisition.

The fair market value of the [property] [and] [property rights] acquired [is] [may be] measured by the difference between the fair market value of the entire property before the acquisition and the fair market value of the property remaining after the acquisition. [The fair market value of the [property] [and] [property rights] acquired [is/are] [may in the alternative also be] measured by the fair market value of the [property] [and] [property rights] acquired before the acquisition plus any damages caused by such acquisition to the remaining property after the acquisition.]

NOTE ON USE

WPI 150.06 and 150.07 (Measure of Compensation—Partial Taking—Benefits) are to be used in the alternative depending upon whether special benefits are claimed. The instruction's second paragraph addresses the alternative methods of valuation (see further discussion in the Comment.)

Use this instruction when only part of the property is being acquired, no benefits are being offset, and market value is the measure of compensation. For partial takings cases when a benefit to the remaining property are claimed, also use WPI 150.10 (Factors—Partial Taking). See Comment to WPI 150.08 (Fair Market Value—Definition). On rights of access, light, view and air, see WPI 151.02 (Access, Light, View and Air—Measure of Compensation).

Use the bracketed material regarding measure of just compensation in the second paragraph as needed based on the value evidence actually presented. The bracketed words and sentence in the second paragraph are included to allow for an instruction when all parties present value evidence based only on the before and after approach, when the parties present value evidence based on both the before and after approach and the severance damage approach, and/or when all parties present value evidence based only on the severance damage approach. Use the appropriate bracketed phrase(s) regarding the property and/or property rights throughout this instruction.

Use the date of trial to measure fair market value if possession and use of the property has not been granted to petitioner prior to trial. If an order has previously been entered granting immediate possession and use of the property to petitioner prior to the date of trial or the date of value is otherwise not in dispute, insert the relevant date.

This instruction applies only to permanent damages. For cases involving temporary damages, use WPI 150.06.02 (Just Compensation—Temporary Occupancy). See the discussion regarding temporary versus permanent damages in the Comment below.

COMMENT

This instruction is based on Armstrong v. City of Seattle, 180 Wash. 39, 38 P.2d 377, 97 A.L.R. 826 (1934); State v. Kelley, 108 Wash. 245, 182 P. 942 (1919); State v. Paul Bunyan Rifle and Sportsman's Club, Inc., 132 Wn.App. 85, 130 P.3d 414 (2006), and State v. Hobart, 5 Wn.App. 469, 487 P.2d 635 (1971). See also RCW 8.04.110; RCW 8.08.050; RCW 8.12.140; State v. McDonald, 98 Wn.2d 521, 525–26, 656 P.2d 1043 (1983); City of SeaTac v. Cassan, 93 Wn.App. 357, 361, 967 P.2d 1274 (1998).

Valuation in partial takings cases. Two basic approaches exist for determining just compensation in partial takings cases. Under the "before and after rule," just compensation is the value of the entire parcel before the taking less the value of the remainder after the taking. Under the "severance damage rule," just compensation is the value of the part taken plus the severance damages resulting to the remainder. See generally Sackman, Nichols, The Law on Eminent Domain § 14.02[1]-[3] (rev. 3d ed.); Stoebuck, 17 Washington Practice: Real Estate §§ 9.22 and 9.23 (2d ed.).

The two approaches are distinct, although appellate opinions do not always clearly distinguish between them. Sackman, Nichols, The Law on Eminent Domain § 14.02[1][a]; e.g., State v. McDonald, 98 Wn.2d 521, 525–26, 531, 656 P.2d 1043 (1983) (primarily discussing the before

and after rule, but also stating the severance damages rule as if it is a restatement of the before and after rule); Central Puget Sound Regional Transit Authority v. Heirs and Devisees of Eastey, 135 Wn.App. 446, 456–59, 144 P.3d 322 (2006), and State v. Paul Bunyan Rifle and Sportsman's Club, Inc., 132 Wn.App. 85, 93–94, 130 P.3d 414 (2006). The before and after rule is "generally the simplest and perhaps the most widely used approach." Sackman, Nichols, The Law on Eminent Domain § 14.02[2].

Comparing "before" and "after" values. This instruction notes that the valuation in the "before" situation is to avoid consideration of the impact of the project on value, but also states that the valuation in the "after" situation is to consider the impact of the acquisition. The use of the term "project" is intentional in that the law requires that no diminution in value caused by any aspect of the project is to be considered in the "before" situation. Similarly, the use of the term "acquisition" with respect to the consideration of value in the "after" situation is also intentional because the law limits the consideration of negative impacts to those impacts caused solely by the acquisition and use of the acquired property, rather than consideration of all impacts that might be caused by the entire project. See Central Puget Sound Regional Transit Authority v. Heirs and Devisees of Eastey, 135 Wn.App. 446, 456–59, 144 P.3d 322 (2006).

Single larger parcel analysis. Damages to remaining property may be recovered only if the condemned property and the remaining property are determined to be part of a single "larger parcel" of land for eminent domain purposes; an owner may not recover for damage to separate and independent tracts of land. State v. McDonald, 98 Wn.2d 521, 525–26, 656 P.2d 1043 (1983); State v. Wandermere Co., 89 Wn.App. 369, 377, 949 P.2d 392 (1997). The "larger parcel" analysis depends on three factors (unity of ownership, unity of use, and contiguity) and represents a jury question if reasonable minds could differ as to the outcome. State v. McDonald, 98 Wn.2d at 526; State v. Wandermere, 89 Wn.App. at 377.

The physical separation of individual properties is not necessarily fatal to establishing a larger parcel. Physically separated properties may still constitute a "larger parcel" under this test, depending on an analysis of unity of use and other factors, including "the distance between the parcels, the extent of adaptation of the parcels to the use to which they are put, and the availability of alternative parcels." State v. McDonald, 98 Wn.2d at 526–27. See Doolittle v. City of Everett, 114 Wn.2d 88, 786 P.2d 253 (1990), for a summary of the law. See generally, Washington Real Property Deskbook § 74.7[4] (4th ed.).

Offsetting benefits. For a discussion of offsetting benefits under

the severance damages rule, see the Comment to WPI 150.07 (Measure of Compensation—Partial Taking—Benefits).

Date of valuation. See discussion on date of valuation in the Comment to WPI 150.05 (Measure of Compensation—Total Taking).

Separate interests. See discussion of separate interests in the Comment to WPI 150.05 (Measure of Compensation—Total Taking).

Impact of project. See the discussion of project impact in the Comment to WPI 150.05 (Measure of Compensation—Total Taking).

Temporary versus permanent damages. Washington cases have drawn a distinction between permanent and temporary injuries. This instruction applies only to permanent injuries. The instruction on temporary damages is WPI 150.06.02 (Just Compensation—Temporary Occupancy).

Noncompensable damages. When damages resulting to the remainder of the property are not compensable as a matter of law, some modification of language may be required to exclude these from the "before and after" measure of compensation. See State v. Fox, 53 Wn.2d 216, 332 P.2d 943 (1958); Wilson v. Oregon-Washington R. & Navigation Co., 71 Wash. 102, 127 P. 847 (1912). This usually can be accomplished by instructions to disregard this element of damages rather than reframing the "measure of compensation" instruction.

[Current as of October 2016.]

WPI 150.06.01

MEASURE OF COMPENSATION—EASEMENT

(Name of agency) **seeks to acquire an easement in [a portion of]** (name of owner's) **property. The term "easement" means a right to use the land of another for specific purposes.** (Name of owner) **will retain the right to use the property for all purposes, except those that are inconsistent with** (name of agency's) **full use of the easement.**

Just compensation means the fair market value of the easement acquired. The fair market value is measured as of [(insert actual date of trial)**] [**(insert actual date of possession and use/agreed date of value)**]. In determining the fair market value of the easement you are not to consider any reduction or increase in the fair market value of the property before the acquisition caused by** (name of agency)**'s project. In determining the fair market value of the remaining property with the easement, after the acquisition, you are to consider the diminution of the fair market value, if any, of the remaining property with the easement caused by the acquisition.**

The fair market value of the easement [is] [may be] measured by the difference between the fair market value of the property before the acquisition and the fair market value of the remaining property with the easement after the acquisition. [The fair market value of the easement acquired [is] [may in the alternative also be] measured by the fair market value of the easement acquired plus any damages caused by such acquisition to the remaining property.]

NOTE ON USE

Use this instruction when an easement is being acquired in the property. See the Note on Use to WPI 150.06 (Measure of Compensation—Partial Taking).

The instruction's second paragraph addresses the alternative methods of valuation. See discussion on valuation in partial takings

cases in the Comment to WPI 150.06 (Measure of Compensation—Partial Taking).

Use the date of trial to measure fair market value if possession and use of the property has not been granted to petitioner prior to trial. If an order has previously been entered granting immediate possession and use of the property to petitioner prior to the date of trial or the date of value is otherwise not in dispute, insert the relevant date.

Use bracketed material regarding measure of just compensation in the second paragraph as needed based on the value evidence actually presented. The bracketed words and sentence in the third paragraph are included to allow for an instruction when all parties present value evidence based only on the before and after approach, when the parties present value evidence based on both the before and after approach and the severance damage approach, and/or when all parties present value evidence based only on the severance damage approach. Use the appropriate bracketed phrase(s) regarding the property and/or property rights throughout this instruction.

COMMENT

This instruction is based on Municipality of Metro. Seattle v. Kenmore Properties, Inc., 67 Wn.2d 923, 929–30, 410 P.2d 790 (1966); Keesling v. City of Seattle, 52 Wn.2d 247, 324 P.2d 806 (1958); Pacific Northwest Pipeline Corp. v. Myers, 50 Wn.2d 288, 311 P.2d 655 (1957); and Chase v. City of Tacoma, 23 Wn.App. 12, 594 P.2d 942 (1979). See also 4 Sackman, Nichols, The Law on Eminent Domain § 12D.01[2][c] (rev. 3d ed.).

In a private condemnation case involving an easement by necessity over an existing roadway to land-locked property, the court held that the existing roadway was an improvement and therefore included the original cost of building the roadway in the calculation of just compensation. Shields v. Garrison, 91 Wn.App. 381, 957 P.2d 805 (1998).

See discussion on date of valuation in the Comment to WPI 150.05 (Measure of Compensation—Total Taking).

[Current as of October 2016.]

WPI 150.06.02

JUST COMPENSATION—TEMPORARY OCCUPANCY

Just compensation for temporary occupancy of property means the reasonable cost of restoring the property to a condition equally valuable as the condition before the occupancy, plus the fair market rental value of the occupied property for the term of the occupancy[, plus any appropriate reduction in rent during the occupancy on contiguous property in the same ownership and devoted to the same use,] [plus any permanent loss in the value of the occupied property, or contiguous property in the same ownership and devoted to the same use, caused by the temporary occupancy]. [If the occupied property can be rented for a lesser use during the term of the temporary occupancy, the measure of damages is the difference in the fair market rent before the occupancy and the fair market rent during the occupancy.] [In determining compensation, you shall offset against such compensation any special benefits accruing to the remaining property as a result of the project.]

NOTE ON USE

Use this instruction when the agency's occupancy of the property will be temporary. When a benefit to the remaining property is alleged, then also use WPI 150.07.01 (What Benefits May Be Offset) to instruct jurors that special benefits are offset against the amount of compensation.

Use the bracketed material depending on the evidence in the case.

COMMENT

Measuring compensation. The measure of compensation in a case involving temporary, rather than permanent, injury is well settled: compensation consists of the reasonable expense of restoring the land and the loss of income pending such restoration within a reasonable time. Colella v. King County, 72 Wn.2d 386, 433 P.2d 154 (1967) (trespass case); Keesling v. City of Seattle, 52 Wn.2d 247, 253, 324 P.2d 806 (1958) (for both trespass and eminent domain cases, the recovery for temporary injuries is the cost of restoration and loss of use); Harkoff

v. Whatcom County, 40 Wn.2d 147, 153, 241 P.2d 932 (1952) (trespass case); Songstad v. Municipality of Metro. Seattle, 2 Wn.App. 680, 690, 472 P.2d 574 (1970) (trespass case). The term "fair market rental value" is what is meant by the phrases "loss of use" or "loss of income" in the cases, as distinguished from impacts to the income generated by businesses conducted on the affected property or the consequential damages to those businesses as a result of the temporary occupancy.

Measuring effect on unencumbered property. The measure of compensation must take into account:

> whether the existence of a temporary construction easement will restrict the property owner from using the unencumbered portion of the land for its highest and best use during the easement's term. Often an appropriate method to estimate the proper adjustment to reflect the diminution in the land's value by reason of the temporary easement is to apply the rent loss to all lands so affected. If the property can be rented for a lesser use during the term of the [temporary construction easement], the measure of damage is usually measured by the rent differential between the before and after situations.

Section D-10, Uniform Standards for Federal Land Acquisitions (Interagency Land Acquisition Conference, 2000).

[Current as of October 2016.]

WPI 150.07

MEASURE OF COMPENSATION—PARTIAL TAKING—BENEFITS

Just compensation means the fair market value of the [property] [and] [property rights] acquired. The fair market value is measured as of [(insert actual date of trial)**] [**(insert actual date of possession and use/agreed date of value)**]. In determining the fair market value of the [property] [and] [property rights], you shall consider as an element of the property's value after the acquisition any special benefits accruing to the remaining property as a result of** (name of agency's) **project, as well as any damages caused by the acquisition. The fair market value of the [property] [and] [property rights] acquired [is] [may be] measured by the difference between the fair market value of the entire property before the acquisition and the fair market value of the property remaining after the acquisition.**

[The fair market value of the [property] [and] [property rights] [is/are] [may also be] measured by the fair market value of the [property] [and] [property rights] acquired before the acquisition plus, in addition, any damages or special benefits caused by such acquisition to the remaining property.]

NOTE ON USE

WPI 150.06 (Measure of Takings—Partial Takings) and 150.07 are to be used in the alternative depending upon whether special benefits are claimed.

The instruction's second paragraph addresses the alternative methods of valuation (see discussion of valuation in partial takings cases in the Comment to WPI 150.06 (Measure of Takings—Partial Takings)).

Use this instruction, instead of WPI 150.06 (Measure of Compensation—Partial Taking), when only part of the property is being acquired, offsetting benefits from the project are claimed, the effect on market value is the measure of compensation, and the owner has elected under

RCW 8.25.220 to have special benefits considered as part of just compensation.

Use the bracketed material regarding measure of just compensation in the second paragraph as needed based on the evidence presented. The bracketed words and sentence in the second paragraph are included to allow for an instruction when all parties present value evidence based only on the before and after approach, when the parties present value evidence based on both the before and after approach and the severance damage approach, and/or when all parties present value evidence based only on the severance damage approach. Use the appropriate bracketed phrase(s) regarding the property and/or property rights throughout this instruction.

Use the date of trial to measure fair market value if possession and use of the property has not been granted to petitioner prior to trial. If an order has previously been entered granting immediate possession and use of the property to petitioner prior to the date of trial or the date of value is otherwise not in dispute, insert the relevant date.

If there is an issue whether claimed benefits qualify for an offset, use this instruction along with WPI 150.07.01 (What Benefits May Be Offset).

COMMENT

See State v. Templeman, 39 Wn.App. 218, 693 P.2d 125 (1984) (approving another similar instruction from a previous edition).

Offsetting benefits. Benefits generally may be offset against the value of the taking as well as against damages. See RCW 8.04.080, 8.08.040, 86.09.211, and 86.09.214; but see RCW 8.12.190 relating to cities. Benefits must be such as can be ascertained with reasonable definiteness and not merely speculative. Great Northern Ry. Co. v. State, 102 Wash. 348, 173 P. 40 (1918). Special findings may be required when benefits are involved. RCW 8.12.190 and 87.03.145. State v. Gilliam, 146 Wash. 6, 262 P. 138 (1927).

Benefits that may be offset are limited to those that will be enjoyed by the remainder of the tract that is used with, contiguous to, and in the same ownership as the part taken. In re Queen Anne Boulevard, 77 Wash. 91, 137 P. 435 (1913).

Municipal corporations. When rights of way are appropriated, municipal corporations may offset benefits. Constit., art. I, § 16, amendment 9. This right remains until taken away by the Legislature. State ex rel. Eastvold v. Yelle, 46 Wn.2d 166, 279 P.2d 645 (1955); Lewis v.

City of Seattle, 5 Wash. 741, 32 P. 794 (1893). The state is a municipal corporation and is entitled to offset benefits, Great Northern Ry. Co. v. State, 102 Wash. 348, as is a county. Little v. King County, 159 Wash. 326, 293 P. 438 (1930).

Other corporations. Corporations "other than municipal" cannot offset benefits. Enoch v. Spokane Falls & N. Ry. Co., 6 Wash. 393, 33 P. 966 (1893). In light of the holdings cited above extending the definition of "municipal corporation" to include the state and counties, it appears that the distinction being drawn is more between public and private corporations than between municipal corporations and other corporations. See also City of Tacoma v. Taxpayers of Tacoma, 49 Wn.2d 781, 798, 307 P.2d 567 (1957) (referring to "a municipal corporation or a public corporation" with regard to eminent domain powers), reversed on other grounds at 357 U.S. 320, 78 S.Ct. 1209, 2 L.Ed.2d 1345 (1958).

Delayed determination of benefits. An owner has a statutory option of deferring the determination of benefits to a later trial. RCW 8.25.220 to .260; State v. Green, 90 Wn.2d 52, 578 P.2d 855 (1978).

Date of valuation. See the discussion on date of valuation in the Comment to WPI 150.05 (Measure of Compensation—Total Taking).

[Current as of October 2017.]

WPI 150.07.01

WHAT BENEFITS MAY BE OFFSET

The benefits, if any, that may be offset are those that accrue to the remaining property as a result of (name of agency's) **project and are special to the remaining property.**

Special benefits are those that add value to the remaining property as distinguished from those arising incidentally and enjoyed by the public generally. Benefits may be special even though other owners receive similar benefits.

If you find that the fair market value of the property has been increased as the result of (name of agency's) **project, that increase is a special benefit.**

NOTE ON USE

Use this instruction with WPI 150.07 (Measure of Compensation—Partial Taking—Benefits), or WPI 150.06.02 (Just Compensation—Temporary Occupancy), when there is an issue of whether or not the claimed benefits are special.

COMMENT

See State v. Green, 90 Wn.2d 52, 578 P.2d 855 (1978) (approving the definition of special benefits in an earlier version of this instruction).

In Lewis v. City of Seattle, 5 Wash. 741, 32 P. 794 (1893), the court held that benefits may be special to a piece of property even though neighbors across the street may have received the same benefits for which they do not have to pay because they are not involved in any condemnation action.

If the fair market value of the remainder is enhanced as a result of the project, the increase is a special benefit. State v. Templeman, 39 Wn.App. 218, 221, 693 P.2d 125 (1984); Spokane Traction Co. v. Granath, 42 Wash. 506, 85 P. 261 (1906); State v. Kelley, 108 Wash. 245, 182 P. 942 (1919). It is not necessary to define general benefits. State v. Templeman, 39 Wn.App. at 221.

[Current as of October 2016.]

WPI 150.08

FAIR MARKET VALUE—DEFINITION

Fair market value means the amount in cash that a well-informed buyer, willing but not obligated to buy the property, would pay, and that a well-informed seller, willing but not obligated to sell it, would accept, taking into consideration all uses to which the property is adapted or may be reasonably adaptable.

NOTE ON USE

Use this instruction in any condemnation trial in which the measure of compensation is the fair market value or the effect on the fair market value of the property.

COMMENT

Compensation is usually based on fair market value. Definitions of market value are found in State v. Rowley, 74 Wn.2d 328, 334, 444 P.2d 695 (1968); City of Medina v. Cook, 69 Wn.2d 574, 418 P.2d 1020 (1966); Donaldson v. Greenwood, 40 Wn.2d 238, 242 P.2d 1038 (1952); and State v. Wilson, 6 Wn.App. 443, 493 P.2d 1252 (1972). See Comments to WPI 150.05 (Measure of Compensation—Total Taking) and WPI 150.06 (Measure of Compensation—Partial Taking).

On the use of different costs as the measure of compensation, see Comments to WPI 151.07 (Costs—Reproduction or Replacement) and WPI 151.08 (Costs—Repairs to Remainder).

Special purpose properties. Measures of compensation other than market value have been applied to properties such as schools, parks, churches, and highways that have no market value or are rarely, if ever, bought or sold. See generally 4 Sackman, Nichols on The Law on Eminent Domain, § 12C.01[1] (rev. 3d ed.); Level, Evaluation of Special Purpose Properties in Condemnation Proceedings, 3 Urb. Lawyer 428 (1971). Cf. City of Tacoma v. Tacoma Light & Water Co., 17 Wash. 458, 50 P. 55 (1897) (price of private waterworks being sold to city was based in part on income valuation approach), overruled in part on other grounds in Parkhurst v. Elliott, 103 Wash. 89, 173 P. 731 (1918). In these situations, a special instruction should be drafted on the measure of compensation.

[Current as of October 2016.]

WPI 150.09

USES

In determining just compensation, you should take into consideration any and all uses to which the property in question is adaptable as of [(insert actual date of trial)] [(insert actual date of possession and use/agreed date of value)]. You also should take into consideration the existing demand for such property within the market where the property is situated or such demand as may be reasonably expected in the reasonably near future.

NOTE ON USE

Use this instruction in every condemnation trial.

Use the date of trial if possession and use of the property has not been granted to petitioner prior to trial. If an order has previously been entered granting immediate possession and use of the property to petitioner prior to the date of trial or the date of value is otherwise not in dispute, insert the relevant date.

COMMENT

The original source of the instruction's language is Mississippi & Rum River Boom Co. v. Patterson, 98 U.S. 403, 25 L.Ed. 206 (1878) (quoted in Ham, Yearsley & Ryrie v. Northern Pac. Ry. Co., 107 Wash. 378, 385, 181 P. 898 (1919)). Similar instructions were given in State v. Elder, 70 Wn.2d 414, 423 P.2d 533 (1967), and State v. Tumwater Lumber Mills Co., 194 Wash. 411, 78 P.2d 160 (1938).

The appropriate measure of market value takes into consideration any and all uses to which the property is adaptable, not simply its highest and best use. State v. Rowley, 74 Wn.2d 328, 444 P.2d 695 (1968); King County v. Crawford & Conover, 92 Wash. 195, 158 P. 733 (1916); see State v. Hobart, 5 Wn.App. 469, 471, 487 P.2d 635 (1971) ("In determining highest and best use, evidence of prior, present and future use in light of reasonably anticipated demands is admissible.").

[Current as of October 2016.]

WPI 150.10

FACTORS—PARTIAL TAKING

In deciding what compensation should be paid for damages, if any, to the remainder of the property, you should take into consideration the uses for which the land is adaptable before and after the acquisition, the character and quality of the property, the shape and condition in which such remaining property is left, the convenience of using the property before and after such acquisition, and such other factors as you believe would affect the fair market value of the property.

NOTE ON USE

Use this instruction in partial takings cases in which damages to the remaining property are claimed. Use this instruction along with WPI 150.06 (Measure of Compensation—Partial Taking) or in the alternative with WPI 150.07 (Measure of Compensation—Partial Taking—Benefits).

COMMENT

This instruction is a modification of an instruction quoted in State v. Calkins, 50 Wn.2d 716, 314 P.2d 449 (1957). See Idaho & W. Ry. Co. v. Coey, 73 Wash. 291, 131 P. 810 (1913). It is error to instruct on specific claimed items of damage after instructing that the measure of compensation is the "before and after" rule. Pacific Northwest Pipeline Corp. v. Myers, 50 Wn.2d 288, 311 P.2d 655 (1957). See State v. Rowley, 74 Wn.2d 328, 444 P.2d 695 (1968).

See discussion on valuation in partial takings cases in the Comment to WPI 150.06 (Measure of Compensation—Partial Taking).

[Current as of October 2016.]

WPI 150.11

FACTORS—REMOTE AND SPECULATIVE

In determining the amount of just compensation, you should limit your consideration to those factors that will actually affect the fair market value of the property and that are established by the evidence. You should not consider any factors that a well-informed and prudent person would find to be remote, imaginary, or speculative.

NOTE ON USE

Use this instruction in every condemnation trial.

COMMENT

An earlier version of WPI 150.11 has been quoted and approved in the case law. See State v. Williams, 68 Wn.2d 946, 416 P.2d 350 (1966) (quoting the original pattern instruction and finding it more concise and balanced than the instruction being upheld in the case); City of Renton v. Scott Pac. Terminal, Inc., 9 Wn.App. 364, 373–74, 512 P.2d 1137 (1973) (concluding that the original pattern instruction "is a correct statement of the law").

Failure to give an earlier version of WPI 150.11 was held to be reversible error in a five to four decision in which the majority held that the particular evidence in that case required such an instruction in order to eliminate speculation on damages. State v. Evans, 96 Wn.2d 119, 127–28, P.2d 845 (1981) (concluding that the instruction was necessary because a series of pre-trial and trial rulings had "created great confusion and necessarily required the jurors to speculate as to the meaning of the court's instructions").

Speculative elements are sometimes interjected into a trial by evidence of uses (Chicago, M. & St. P. Ry. Co. v. Alexander, 47 Wash. 131, 91 P. 626 (1907)), or damages (Idaho & W. Ry. Co. v. Coey, 73 Wash. 291, 131 P. 810 (1913)), or the jury speculating on value by an improper use of admissible evidence (e.g., multiplication of price times yardage in pit site cases, State v. Mottman Mercantile Co., 51 Wn.2d 722, 321 P.2d 912 (1958)).

[Current as of October 2016.]

WPI 150.12

VIEW

You have been permitted to view a site involved in this case for the sole purpose of helping you understand the evidence presented to you in this courtroom. What you actually saw at the site or its surrounding area is not evidence. [The conditions and physical features at the site on the day of your visit may or may not have changed from those existing on the date you are to use in valuing the property.] You are to rely solely on the testimony of witnesses and on the exhibits in order to decide issues involving the physical characteristics or appearance of the site [on the property's valuation date].

NOTE ON USE

Use this written instruction when the jury has been permitted to view the premises being condemned. It may be used in an inverse condemnation or other case when the issues involve the damage or value of particular property.

The judge should also orally instruct the jurors before they view the site. See WPI 6.03 (View—Before Visiting a Site) (appropriate modifications will need to be made for an eminent domain case).

Use the bracketed sentence and insert the relevant date in the last bracketed clause if the jury is to value the property as of a date other than the date of trial.

COMMENT

The instruction is based on the pattern instruction on jury views for use in general civil cases, WPI 2.14 (View of Site is Not Evidence) (with modification to use terminology specific to eminent domain cases). In its previous shorter form, WPI 150.12 was quoted with approval in State v. Williams, 68 Wn.2d 946, 416 P.2d 350 (1966).

The court may allow, by agreement, certain features to be pointed out by the lawyers. See WPI 6.03 (View—Before Visiting Site).

The sole purpose of a view is to give help in understanding the evidence. Petition of City of Seattle to Acquire Certain Property in

Moore's Five Acre Tracts, 49 Wn.2d 247, 299 P.2d 843 (1956). See Comments to WPI 2.14 (View of the Site is Not Evidence) and WPI 6.03 (View—Before Visiting a Site).

The instruction's bracketed sentence relates to changes in the condition or features of the property between the date upon which the property is to be valued and the date of the jury's visit. Jurors should not be instructed as to changes in circumstances in those eminent domain cases in which the property is to be valued as of the date of the trial. See discussion on date of valuation in the Comment to WPI 150.05 (Measure of Compensation—Total Taking).

[Current as of October 2016.]

WPI 150.13

AGENCY PLANS—PARTIAL TAKING

(Name of agency) has introduced evidence showing the particular manner in which it will use the property being acquired. In determining compensation, you must assume that (name of agency) will use the property in accordance with this evidence. You are to consider this evidence as it may affect the fair market value of (name of owner's) remaining property.

NOTE ON USE

Use this instruction in partial taking cases in which petitioner presents evidence of the particular manner in which it intends to use the property being acquired.

COMMENT

In order to prevail, the petitioner must present evidence of the proposed use it intends to make of the property being acquired. See State v. Basin Development & Sales Co., 53 Wn.2d 201, 204, 332 P.2d 245 (1958).

Just compensation is determined according to the petitioner's proposed use for the property. State v. Basin Develop. & Sales Co., 53 Wn.2d at 204; State v. Ward, 41 Wn.2d 794, 252 P.2d 279 (1953). In *Ward*, the court explained that the "damages suffered and to be paid for are those occasioned by the particular plan [the petitioner] adopts," and jurors should not be instructed as to "such hypothetical situations as exist only in [the property owners'] minds." State v. Ward, 41 Wn.2d at 797.

[Current as of October 2016.]

WPI 150.14

MANNER OF CONSTRUCTION AND USE—PARTIAL TAKING

In your deliberations regarding the market value of the property, you must assume that (name of agency's project) **will be constructed, maintained, and operated in a proper and lawful manner.**

NOTE ON USE

Use this instruction in a partial taking case in which inferences might be drawn from the testimony that petitioner's project would not be properly constructed and maintained.

COMMENT

Failure to give such an instruction was held error in Pacific Northwest Pipeline Corp. v. Myers, 50 Wn.2d 288, 311 P.2d 655 (1957).

[Current as of October 2016.]

WPI 150.15

WITNESSES—OPINIONS—JUST COMPENSATION

A witness who has special training, education, or experience may be allowed to express an opinion in addition to giving testimony as to facts.

You are not, however, required to accept his or her opinion. To determine the credibility and weight to be given to this type of evidence, you may consider, among other things, the education, training, experience, knowledge, and ability of the witness. You may also consider the reasons given for the opinion and the sources of his or her information, as well as considering the factors already given to you for evaluating the testimony of any other witness.

[In this case, (name of owner) **has also been allowed to express an opinion as to the value of the property in question. Again, you are not required to accept this opinion. In determining the weight to be given to this opinion, you should consider the facts and reasons upon which the opinion is based and** (name of owner's) **knowledge of, and experience with, the subject. You should also consider the general rules for determining the credibility of witnesses, contained elsewhere in these instructions.]**

NOTE ON USE

Give this instruction in every condemnation case. The instruction may be incorporated into WPI 1.02 (which contains the general rules for evaluating the credibility of witnesses). See WPI 1.02 (Conclusion of Trial—Introductory Instruction).

Use this instruction, which is tailored specifically to condemnation cases, as a substitute for WPI 2.10 (Expert Testimony).

Use the bracketed material if the owner also testifies on the issue of value.

COMMENT

The first two paragraphs of this instruction relate to expert

testimony and are the same as WPI 2.10 (Expert Testimony). For more detailed commentary on these first two paragraphs of the instruction, see the Comment following WPI 2.10 (Expert Testimony).

The bracketed portion of WPI 150.15 relates to testimony by the property owner. By long-standing tradition, a property owner is allowed to testify as to the value of the property in question, even if the owner does not otherwise qualify as an expert. See, e.g., Cunningham v. Town of Tieton, 60 Wn.2d 434, 436, 374 P.2d 375 (1962) ("The decisional law leaves no room for doubt that the owner may testify as to the value of his property because he is familiar enough with it to know its worth"); State v. Larson, 54 Wn.2d 86, 338 P.2d 135 (1959) (owner may testify as to value, but may not base the testimony on an improper formula).

The instruction does not contemplate the possibility of a lay witness, other than an owner, testifying as to the value of the property. In one reported case, a nonowner was permitted to express an opinion on the value of real property. Pacific Northwest Pipeline Corp. v. Myers, 50 Wn.2d 288, 311 P.2d 655 (1957) (neighbor permitted to testify as to value of land). This case, however, should not be interpreted as establishing a general rule that any lay witness may express an opinion on the value of any property. On close reading, it will be seen that the court in *Myers* looked to the witness's qualifications and determined that the witness qualified as an expert on the basis of personal knowledge and practical experience—a result consistent with the definition of an expert under Evidence Rule 702.

[Current as of October 2016.]

WPI 150.16

CONCLUDING INSTRUCTION

When you are taken to the jury room to deliberate, your first duty is to select a presiding juror. The presiding juror's responsibility is to see that you discuss the issues in this case in an orderly and reasonable manner, that you discuss each issue submitted for your decision fully and fairly, and that each one of you has a chance to be heard on every question before you. Deliberations are to occur only in the jury room when all [six] [twelve] jurors are present.

You are all officers of the court and must evaluate the evidence with an open mind free of bias or prejudice. If during your deliberations, you become concerned that the discussions are being influenced by preconceived bias or prejudice, you must bring this to the attention of the other jurors so that the issue may be fairly discussed among all members of the jury.

You will be given [the exhibits admitted in evidence,] these instructions [,] and (fill in number) verdict form[s] for recording your verdict. [Exhibits may have been marked by the court clerk and given a number, but they do not go with you to the jury room during your deliberations unless they have been admitted into evidence. The exhibits that have been admitted will be available to you in the jury room.]

During your deliberations, you may discuss any notes that you have taken during the trial, if you wish. You have been allowed to take notes to assist you in remembering clearly, not to substitute for your memory or the memories or notes of other jurors. Do not assume, however, that your notes are more or less accurate than your memory.

You will need to rely on your notes and memory as to

the testimony presented in this case. Testimony will rarely, if ever, be repeated for you during your deliberations.

If you need to ask the court a legal or procedural question that you have been unable to answer among yourselves after reviewing the evidence and instructions, write the question out simply and clearly. [For this purpose, use the form provided in the jury room.] The presiding juror should sign and date the question and give it to the bailiff. I will confer with counsel to determine what answer, if any, can be given.

In your question to the court, do not indicate how your deliberations are proceeding. Do not state how the jurors have voted on any particular question, issue, or claim, nor in any other way express your opinions about the case.

In order to reach a verdict [ten] [five] of you must agree. When [ten] [five] of you have agreed, then fill in the amount of just compensation that you find should be paid in this case. The presiding juror must sign the verdict whether or not the presiding juror agrees with it. The presiding juror will then inform the bailiff that you have reached a verdict. The bailiff will conduct you back into this courtroom where the verdict will be announced.

NOTE ON USE

Use this instruction along with WPI 150.17 (Verdict Form—Condemnation) in every condemnation trial except when special verdicts or findings are required. For a discussion of special verdicts or findings, see the Comment.

In an inverse condemnation case involving an issue of liability as well as damages, this instruction should be modified by using WPI 1.09 (Use of General Verdict Forms for Single Plaintiff and Defendant), as an inserted paragraph on the use of verdict forms.

COMMENT

This instruction is substantially the same as WPI 1.08 (Concluding Instruction—Basic Form), adapted to fit a condemnation case.

New to this edition is the second paragraph of the instruction,

which encourages all members of the jury to be responsible for ensuring that decisions are made based solely on the evidence and not upon preconceived biases or prejudices. The United States Supreme Court in Peña-Rodriguez v. Colorado, ___ U.S. ___, 137 S.Ct 855, 869, 197 L.Ed.2d 107 (2017), concluded that the general rule against impeaching a jury verdict must fall when a juror has indicated that he or she relied on racial animus or stereotypes in reaching the verdict. See also Turner v. Stime, 153 Wn.App. 581, 222 P.3d 1243 (2009).

For a discussion of other issues involving both conscious and unconscious bias, see the Comment to WPI 1.01 (Advance Oral Instruction—Beginning of Proceedings).

This concluding instruction is drafted to be used with the simple verdict form set forth in WPI 150.17 (Verdict Form—Condemnation). In some cases, however, the jurors will need a more detailed verdict form, such as when separate interests in property are involved. See discussion of separate interests in the Comment to WPI 150.05 (Measure of Compensation—Total Taking). For these cases, the concluding instruction should be drafted based on WPI 1.11 (Concluding Instruction—Special Verdict Form), with appropriate modifications.

[Current as of March 2018.]

WPI 150.17

VERDICT FORM—CONDEMNATION

(Insert case caption.)

We, the jury, find the just compensation to be paid by to (insert names of owners, lenders, etc.) **for the [property] [and] [property rights] is $_____.**

DATE: _____ _____

Presiding Juror

NOTE ON USE

A separate verdict form should be used for each parcel of property. Fill in the names of petitioner and respondent, and a reference to the property and/or property rights, if applicable, before the verdict form is submitted to the jury.

Use this verdict form when a lump sum verdict is to be returned for all interests. When findings for special interests or benefits are required, appropriate verdict or interrogatory forms must be drafted. See discussion of separate interests in the Comment to WPI 150.05 (Measure of Compensation—Total Taking).

In an inverse condemnation case involving an issue of liability as well as damages, use the appropriate verdict form from WPI Chapter 45 (Forms of Verdicts).

[Current as of October 2016.]

CHAPTER 151

EMINENT DOMAIN—SPECIAL INSTRUCTIONS

WPI 151.01 Access, Light, View, and Air—Abutting Public Way
WPI 151.02 Access, Light, View, and Air—Measure of Compensation
WPI 151.03 Access—Diversion of Traffic
WPI 151.04 Circuity of Travel to and From Property
WPI 151.05 Business Income—Profits
WPI 151.06 Costs—Purchase Price
WPI 151.07 Costs—Reproduction or Replacement
WPI 151.08 Costs—Repairs to Remainder
WPI 151.09 Offers
WPI 151.10 Plans of Owner
WPI 151.11 Platting
WPI 151.12 Sales—Comparables
WPI 151.13 Sales to Condemnor
WPI 151.14 Value to Condemnor
WPI 151.15 Zoning

WPI 151.01

ACCESS, LIGHT, VIEW, AND AIR—ABUTTING PUBLIC WAY

Owners of property abutting upon an existing public way have rights of [access] [light] [view] [and] [air] to and from such public way.

[The right of access means that an owner is entitled to reasonable ingress and egress to the property. However, an owner is not necessarily entitled to access at all points along the boundary between the property and the existing public way.]

[Unless such rights of [access] [light] [view] [and] [air] are substantially impaired, such owner has suffered no compensable damage in regard to these rights.]

NOTE ON USE

Use this instruction when property rights taken or damaged include the rights of access, light, view, or air of an owner whose property abuts an existing public way.

Use bracketed material as applicable. If only one of the four bracketed rights is at issue, then the instruction will need to be slightly modified.

COMMENT

In general. RCW 47.52.040 through.050 apply to limited access highways and address the rights covered in this instruction. These rights are governed not only by statutes, but also by independent judicial doctrine. See Fry v. O'Leary, 141 Wash. 465, 252 P. 111, 49 A.L.R. 1249 (1927) (addressing the rights of access, light, air, and view without discussing any statutes). For further discussion of the rights addressed in this instruction, see State v. Fox, 53 Wn.2d 216, 332 P.2d 943 (1958); State v. Kodama, 4 Wn.App. 676, 483 P.2d 857 (1971); Fry v. O'Leary, 141 Wash. 465. These rights are confined to existing public ways. State v. Calkins, 50 Wn.2d 716, 314 P.2d 449 (1957).

Right of access. On the reasonableness of access and restrictions of access, see TT Properties v. City of Tacoma, 192 Wn.App. 238, 366 P.3d 465 (2016) (abutting owner has the right of access to the property but not to a particular street); also see Pande Cameron & Co. of Seattle, Inc. v. Central Puget Sound Regional Transit Authority, 610 F.Supp.2d 1288 (W.D. Wash. 2009) (no authority under Washington law for a temporary "right of access" or a temporary "right to light, air, and view" takings claim); Kieffer v. King County, 89 Wn.2d 369, 572 P.2d 408 (1977) (whether there is a "substantial" impairment of access is a question of fact); State v. Williams, 64 Wn.2d 842, 394 P.2d 693 (1964); Lenci v. City of Seattle, 63 Wn.2d 664, 388 P.2d 926 (1964); Denman v. City of Tacoma, 148 Wash. 314, 268 P. 1043 (1928); Union Elevator & Warehouse Co., Inc. v. Dept. of Transp., 96 Wn.App. 288, 980 P.2d 779 (1999). Cf. Martin v. Port of Seattle, 64 Wn.2d 309, 391 P.2d 540 (1964).

Right of view. An owner of property abutting an existing public way has a compensable right of view. Fry v. O'Leary, 141 Wash. 465, 468–70, 252 P. 111, 49 A.L.R. 1249 (1927). In other contexts, however, the taking of an owner's view may not be compensable. Taft v. Washington Mut. Sav. Bank, 127 Wash. 503, 221 P. 604 (1923). Inverse condemnation actions may not be maintained for loss of view unless an easement, covenant, statute, or some other source grants an affirmative right of view. Pierce v. Northeast Lake Washington Sewer and Water Dist., 123 Wn.2d 550, 870 P.2d 305 (1994). On the general nature of the right of view, see Housing Authority of City of Seattle v. Brown, 68 Wn.2d 485, 413 P.2d 635 (1966).

[Current as of October 2016.]

WPI 151.02

ACCESS, LIGHT, VIEW, AND AIR—MEASURE OF COMPENSATION

Just compensation is the difference between the fair market value of the property before the acquisition of the rights of [access] [light] [view] [and] [air] and the fair market value of the property after the acquisition of such property rights.

NOTE ON USE

Use this instruction when rights of access, light, view, or air are being acquired rather than the total ownership of a portion of the property.

Select the applicable bracketed word or words.

COMMENT

When access rights are taken or damaged, the before and after rule is the measure of compensation. Housing Authority of City of Seattle v. Brown, 68 Wn.2d 485, 413 P.2d 635 (1966); State v. Ward, 41 Wn.2d 794, 252 P.2d 279 (1953); Kincaid v. City of Seattle, 74 Wash. 617, 134 P. 504 (1913).

This measure may need to be qualified when non-compensable damages are also involved, such as those resulting from installation of a center median barrier or other traffic control devices allowed without compensation under the exercise of the police power. See State v. Williams, 64 Wn.2d 842, 394 P.2d 693 (1964); State v. Fox, 53 Wn.2d 216, 332 P.2d 943 (1958); Central Puget Sound Regional Transit Authority v. Heirs and Devisees of Eastey, 135 Wn.App.446, 144 P.3d 322 (2006). See discussion of noncompensable damages in the Comment to WPI 150.06 (Measure of Compensation—Partial Taking).

[Current as of October 2016.]

WPI 151.03

ACCESS—DIVERSION OF TRAFFIC

An owner has no right in the continuation or maintenance of the flow of traffic past the property. You shall allow no compensation because traffic is diverted from the remaining property as a result of traffic control measures [, such as (insert measure that applies to the case)**,] installed as part of** (name of agency's) **project.**

NOTE ON USE

Use this instruction when a street or highway project results in traffic being diverted from the owner's remaining property.

COMMENT

This instruction applies to the installation of traffic control measures, such as center median barriers and traffic signals, as well as changes in traffic patterns, such as one-way streets. In Walker v. State, 48 Wn.2d 587, 295 P.2d 328 (1956), construction of a median that prevented left-hand turns into the plaintiff's property was held to be a proper exercise of the police power that did not result in a compensable damage. The same result was reached in Kahin v. City of Seattle, 64 Wn.2d 872, 395 P.2d 79 (1964), with respect to traffic regulatory markers that converted a two-way street into a one-way street. See also State v. Fox, 53 Wn.2d 216, 220, 332 P.2d 943 (1958) (diversion of traffic because of a median strip falls within the police power of the state). However, in McMoran v. State, 55 Wn.2d 37, 345 P.2d 598 (1959), construction of a frontage road was held to result in compensable damage.

For a discussion of the related issue of circuity of travel, see the Comment to WPI 151.04 (Circuity of Travel to and from Property).

[Current as of October 2016.]

WPI 151.04

CIRCUITY OF TRAVEL TO AND FROM PROPERTY

No compensation is allowable because a more circuitous route must be taken in going to or leaving from the remaining property as a result of (name of agency's) **project, unless access is eliminated or substantially impaired.**

NOTE ON USE

Use this instruction when a street or highway project necessitates the following of a more circuitous route in getting to or leaving the owner's remaining property.

Do not use this instruction when the issue is access from or to an existing abutting roadway. See WPI 151.01 (Access, Light, View, and Air—Abutting Roadway).

COMMENT

In Walker v. State, 48 Wn.2d 587, 591, 295 P.2d 328 (1956), the court held that "[c]ircuity of route, resulting from an exercise of the public power, is an incidental result of a lawful act. It is not the taking or damaging of a property right." Recovery for circuity of route is likewise precluded under RCW 47.52.041 with regard to limited access facilities. See also State v. Fox, 53 Wn.2d 216, 220, 332 P.2d 943 (1958) (circuity of route required by a median strip falls within the police power of the state).

Nevertheless, cases have held that damages for circuity of route may be recoverable when the disruption is particularly severe. In Union Elevator & Warehouse Co. v. State ex rel. Dept. of Transp., 96 Wn.App. 288, 296, 980 P.2d 779 (1999), the court held that a property owner may recover for circuity of travel when the owner's right of access is either eliminated or substantially impaired. Mere inconvenience of travel does not constitute substantial impairment of access. Union Elevator & Warehouse Co. v. State ex rel. Dept. of Transp., 96 Wn.App. at 296. The issue of remaining access is to be determined on the basis of "reasonableness, adequacy and commercial practicability." Union Elevator & Warehouse Co. v. State ex rel. Dept. of Transp., 96 Wn.App. at 297–98.

In State v. Calkins, 50 Wn.2d 716, 314 P.2d 449 (1957), damages from circuity of travel were allowed when they resulted from dividing a parcel into two parts by a limited access highway. See also State v. Kodama, 4 Wn.App. 676, 483 P.2d 857 (1971) (owners of nonabutting property were entitled to recover for resulting circuity of travel when

limited access highway cut across easement road running between their property and public thoroughfare).

For a related discussion, see the Comment to WPI 151.03 (Access—Diversion of Traffic).

[Current as of October 2016.]

WPI 151.05

BUSINESS INCOME—PROFITS

[Although evidence has been introduced with reference to the income or profits earned by the business on the premises, this evidence was admitted solely for the purpose of showing a use to which the property is adapted and should be considered by you for this purpose only.] You may not award compensation for any loss of profits or income that may be caused by the taking. It is the owner's real property, not the business, that is being acquired, and you may award compensation only for the owner's rights in the real property.

NOTE ON USE

Use this instruction when it is necessary to limit consideration of evidence on income or profits from a business conducted on the condemned premises. Use the bracketed material when there is proof with respect to the business conducted on the premises. The bracketed portion should not be given when use of evidence on income or profits may legally be considered on issues other than the use of the premises.

COMMENT

WPI 151.05 was approved in City of Renton v. Scott Pac. Terminal, Inc., 9 Wn.App. 364, 512 P.2d 1137 (1973).

General rule. Generally, evidence of income or profits from a business conducted on the premises is not allowed to establish value. The character and volume of business conducted on the premises may be admissible on the question of uses to which the property is adaptable. City of Renton v. Scott Pac. Terminal, Inc., 9 Wn.App. 364; State v. McDonald, 98 Wn.2d 521, 531–32, 656 P.2d 1043 (1983).

It may be error to give this instruction when there is no dispute about the highest and best use of the property. State v. Obie Outdoor Advertising, Inc., 9 Wn.App. 943, 948–49, 516 P.2d 233 (1973).

Material deposits. Compensation for lands containing minerals, gravels, or similar deposits is generally based on the market value of the land. Multiplying the volume of material by its value per yard in place is improper unless these calculations are used to explain and sup-

port estimates of the value of the land. State v. Mottman Mercantile Co., 51 Wn.2d 722, 321 P.2d 912 (1958); State v. Wandermere Co., 89 Wn.App. 369, 382–83, 949 P.2d 392 (1997); State v. Hobart, 5 Wn.App. 469, 487 P.2d 635 (1971). A cautionary instruction limiting the jury's consideration of these calculations need not be given if the evidence includes other measures of compensation for the land. State v. Wandermere Co., 89 Wn.App. at 383. Yardage values need to be supported with evidence of market demand and any other factors affecting value. State v. Rowley, 74 Wn.2d 328, 444 P.2d 695 (1968); State v. Larson, 54 Wn.2d 86, 338 P.2d 135 (1959).

Multiplication of volume and yardage price was allowed when a leasehold interest was involved, the materials had been severed, and a market existed for the materials in their present condition. Smithrock Quarry, Inc. v. State, 60 Wn.2d 387, 374 P.2d 168 (1962).

Exceptions to general rule. In some cases, the nature of the business done on the land may be so closely related to the land itself that the nature and amount of business and the income therefrom may be admissible as bearing directly upon value of the land. Such cases will usually involve the income method of valuation. Giving this instruction without modification in these cases might be error. See, e.g., State v. Mottman Mercantile Co., 51 Wn.2d 722; Seattle & M.R. Co. v. Roeder, 30 Wash. 244, 252, 70 P. 498 (1902).

The general rule may be different for special purpose properties. See City of Tacoma v. Tacoma Light & Water Co., 17 Wash. 458, 50 P. 55 (1897), overruled in part on other grounds in Parkhurst v. Elliott, 103 Wash. 89, 92, 173 P. 731 (1918); see discussion on special purpose properties in the Comment to WPI 150.05 (Measure of Compensation—Total Taking).

[Current as of October 2016.]

WPI 151.06

COSTS—PURCHASE PRICE

An owner is entitled to the fair market value of the property condemned regardless of what it may have cost the owner.

NOTE ON USE

Use this instruction when evidence is introduced on the owner's cost of the property or improvements placed thereon.

COMMENT

Costs are not the measure of compensation; the measure is the market value of the property. In re Issaquah, 31 Wn.2d 556, 197 P.2d 1018 (1948); Pacific County v. Astoria North Beach Ferry Co., 170 Wash. 643, 17 P.2d 40 (1932); Kincaid v. City of Seattle, 74 Wash. 617, 134 P. 504 (1913); City of Renton v. Scott Pac. Terminal, Inc., 9 Wn.App. 364, 512 P.2d 1137 (1973); State v. Wilson, 6 Wn.App. 443, 493 P.2d 1252 (1972).

[Current as of October 2016.]

WPI 151.07

COSTS—REPRODUCTION OR REPLACEMENT

You are to consider evidence of reproduction or replacement costs of improvements on this property only to the extent that such costs affect the fair market value of the property as a whole.

NOTE ON USE

Use this instruction when evidence of reproduction or replacement costs is used by a witness as a factor in forming an opinion of market value.

COMMENT

One method of valuing real property is the "cost approach," which utilizes the reproduction or replacement costs of improvements taken or damaged.

The cost is only one factor to be considered in determining fair market value. Shields v. Garrison, 91 Wn.App. 381, 386, 957 P.2d 805 (1998) (private condemnation of easement by necessity); State v. Obie Outdoor Advertising, Inc., 9 Wn.App. 943, 516 P.2d 233 (1973); City of Renton v. Scott Pac. Terminal, Inc., 9 Wn.App. 364, 512 P.2d 1137 (1973); State v. Wilson, 6 Wn.App. 443, 493 P.2d 1252 (1972). When the cost approach is used, a proper deduction must be made for depreciation. State v. Wilson, 6 Wn.App. 443, 447, 493 P.2d 1252 (1972); Shields v. Garrison, 91 Wn.App. at 386.

[Current as of October 2016.]

WPI 151.08

COSTS—REPAIRS TO REMAINDER

You are to consider evidence of costs of repairs to the remaining property made necessary by this taking only to the extent that such costs affect the market value of the remaining property.

NOTE ON USE

Use this instruction when there is evidence of the costs of repairs or rehabilitation of the remaining property necessitated by the taking.

COMMENT

Costs of rehabilitation or repair are not usually the measure of compensation; evidence of such costs is to be considered only as a factor in arriving at market value. Seattle Mattress & Upholstery Co. v. City of Seattle, 134 Wash. 476, 236 P. 84 (1925); Seattle & M. Ry. Co. v. Murphine, 4 Wash. 448, 30 P. 720 (1892). See Comment to WPI 151.07 (Costs—Reproduction or Replacement).

[Current as of October 2016.]

WPI 151.09

OFFERS

Offers to buy and offers to sell property are not evidence of value and shall be disregarded by you in determining fair market value.

NOTE ON USE

Use this instruction if reference has been made to offers to buy or sell property during the presentation of proof on the market value of the property.

COMMENT

Offers may not be used to establish market value. North Coast R. Co. v. Newman, 66 Wash. 374, 119 P. 823 (1911); Chicago M. & St. P. Ry. Co. v. Alexander, 47 Wash. 131, 91 P. 626 (1907).

[Current as of October 2016.]

WPI 151.10

PLANS OF OWNER

You may consider the owner's particular plans for development and use of the property only for the purpose of determining uses to which the property would have been adaptable as of [(insert actual date of trial)] [(insert actual date of possession and use/agreed date of value)] absent (name of agency's) project. You shall not consider such plans to determine loss of earnings or profits that may be claimed by the owner, because such losses are not compensable.

NOTE ON USE

Use this instruction if an attempt has been made to establish value by showing plans of the owner for future development of the property.

Use the date of trial if possession and use of the property has not been granted to petitioner prior to trial. If an order has previously been entered granting immediate possession and use of the property to petitioner prior to the date of trial or the date of value is otherwise not in dispute, insert the relevant date.

COMMENT

An owner's plans for use of property are admissible to show a use to which the property is adaptable. Such evidence is not admissible, however, as direct evidence of value or to show damages by way of lost earnings or profits. State v. Larson, 54 Wn.2d 86, 338 P.2d 135 (1959); State v. Mottman Mercantile Co., 51 Wn.2d 722, 321 P.2d 912 (1958); Seattle, P.A. & L.C. Ry. v. Land, 81 Wash. 206, 142 P. 680 (1914).

[Current as of October 2016.]

WPI 151.11

PLATTING

If you find that subdividing is an available use of this property and that there is a present demand for that use, such use may be considered as a factor in arriving at the fair market value of the property. However, you are not to value the property as though it were subdivided. [Value may not be based on the prices that might be realized from lots if the property were subdivided, except as those prices may impact what a buyer would pay for the property in its undivided state.]

NOTE ON USE

Use this instruction when the property is claimed to be adaptable to subdividing. Regarding use of the bracketed last sentence, see the Comment below.

COMMENT

The instruction's bracketed sentence was revised in 1997 for the second edition. Before 1997, the sentence stated that: "Value may not be based on the prices which might be realized from lots if the property were subdivided." This former language was based on City of Medina v. Cook, 69 Wn.2d 574, 418 P.2d 1020 (1966), in which the court stated that "the determination of the use value of unimproved acreage by comparison to the value of town lots of a fully developed subdivision leads to speculation and conjecture as to its present market value." City of Medina v. Cook, 69 Wn.2d at 578. However, the court in State v. Swarva, 86 Wn.2d 29, 31, 541 P.2d 982 (1975), stated that the rule in *Medina* was intended to prevent jury speculation, and that it was not error to admit appraisal testimony using the subdivision approach if doing so was supported by the evidence.

See also Chase v. City of Tacoma, 23 Wn.App. 12, 15–16, 594 P.2d 942 (1979), in which the court criticized the rule in *Medina* as beyond the requirements of the case and not supported by the treatise cited, Sackman, Nichols The Law on Eminent Domain, § 18.05[3] and §§ 18-39 to 18-40. According to the court, the proper principle to be applied is that admissibility of the sale price of developed parcels to show the value of an undeveloped parcel depends upon a foundational showing of (1) the adaptability of the undeveloped parcel to the use to which the developed parcel is devoted, and (2) a present market demand for the

undeveloped parcels if it were so developed. Chase v. City of Tacoma, 23 Wn.App. at 17.

[Current as of October 2016.]

WPI 151.12

SALES—COMPARABLES

(The WPI Committee recommends that no instruction be given on this subject.)

COMMENT

The WPI Committee believes that no instruction should be given commenting upon or singling out this particular kind of evidence of market value. In State v. Elder, 70 Wn.2d 414, 423 P.2d 533 (1967), the court held that it was not error to refuse an instruction advising the jury to disregard sales that were not near in time and place.

[Current as of October 2016.]

WPI 151.13

SALES TO CONDEMNOR

You should disregard the amount of compensation paid to other property owners by an agency with the power to condemn unless you find that the sale was not influenced by the power of condemnation.

NOTE ON USE

Use this instruction when an attempt is made to establish market value by evidence of sales to a condemnor.

COMMENT

Awards paid for other condemned property or purchases of other property by a condemnor are not competent as proof of market value, unless it can be shown that the sale was not influenced by the power of condemnation. See City of Medina v. Cook, 69 Wn.2d 574, 418 P.2d 1020 (1966); Port of Seattle v. Blatz, 59 Wn.2d 55, 365 P.2d 779 (1961); State v. Hobart, 5 Wn.App. 469, 471–72, 487 P.2d 635 (1971).

[Current as of October 2016.]

WPI 151.14

VALUE TO CONDEMNOR

Fair market value cannot be measured by the value of the property to (name of agency), the value of (name of agency's) project, or (name of agency's) need for the particular property.

NOTE ON USE

Use this instruction if an attempt has been made to establish value based upon these factors.

COMMENT

In State v. Larson, 54 Wn.2d 86, 338 P.2d 135 (1959), the court held that a lease in which the state had agreed to pay ten cents per yard for gravel in place was properly excluded. The court stated that just compensation to the owner was what the owner had lost and not what the condemnor had gained.

[Current as of October 2016.]

WPI 151.15

ZONING

You are to value the property in view of uses permitted under present zoning. However, if you find there is a reasonable probability that zoning will be changed in the near future, you may consider the effect of such probability on the fair market value of the property. [You may not, however, consider any effect on zoning caused by the project for which the property is being acquired.]

NOTE ON USE

Use this instruction when evidence has been introduced regarding the probability of a zoning change and its effect on the value of the property. Use the bracketed material when there is evidence that the probability of a zoning change is enhanced or diminished by pendency of the project for which the property is being acquired.

The cases cited in the Comment below involve the acquisition of the entire property. Appropriate modifications should be made if this instruction is used in a partial takings case.

COMMENT

This instruction (without the bracketed phrase) was approved in City of Bellevue v. Kravik, 69 Wn.App. 735, 850 P.2d 559 (1993). The Court of Appeals also held that evidence that a governmental body has intentionally manipulated zoning to depress the value of property being condemned may be presented to the jury on the issue of the reasonable probability of a rezone.

In State v. Motor Freight Terminals, Inc., 57 Wn.2d 442, 357 P.2d 861 (1960), the court held there was a reasonable probability that the subject property would be rezoned in view of its character and that of nearby properties.

In deciding whether it is reasonably probable that a property will be rezoned in the future, the fact finder is to consider what an objectively reasonable governing body would do. See State v. Motor Freight Terminals, Inc., 57 Wn.2d at 445 (referring to a "responsible" governing body using "reason and common sense"); City of Bellevue v. Kravik, 69 Wn.App. at 738, 741 (referring to a hypothetical "reasonable legislative body" and holding that the property owner need not actually have submitted an application to a particular legislative body).

The court in State v. Kruger, 77 Wn.2d 105, 459 P.2d 648 (1969), held that it was error to give WPI 151.15 without the bracketed material when there was proof that the probability of the zoning change was created by the project for which the property was being acquired. This rule was also applied in State v. Sherrill, 13 Wn.App. 250, 534 P.2d 598 (1975), when the rezoning of the subject property had been accomplished prior to the trial to determine compensation. These latter cases illustrate the principle that a condemnor is not required to pay for the enhancement in value that results from the project for which the property is being acquired. See Pierce County v. Duffy, 104 Wash. 426, 176 P. 670 (1918); Annotation, Increment to Value, From Project for Which Land is Condemned, As a Factor in Fixing Compensation, 147 A.L.R. 66 (1943).

Conversely, if the project generally diminishes land values, such diminution should be disregarded. Lange v. State, 86 Wn.2d 585, 591, 547 P.2d 282 (1976) ("Any decrease in property value attributable to the project for which the eminent domain proceeding is instituted is to be disregarded in computing just compensation."). Special instructions may have to be drafted to cover such situations.

[Current as of October 2016.]

PART XI

WORKERS' COMPENSATION

CHAPTER 155 WORKERS' COMPENSATION

CHAPTER 155

WORKERS' COMPENSATION

WPI 155.00	Introduction
WPI 155.01	Conclusion of Trial—Introductory Instruction
WPI 155.01.01	Evidence Limited to Record
WPI 155.02	Board's Findings
WPI 155.02.01	Issues
WPI 155.03	Burden of Proof
WPI 155.04	Explanation of the Industrial Insurance System
WPI 155.05	Negligence Not An Issue
WPI 155.06	Proximate Cause—Allowed Claim
WPI 155.06.01	Proximate Cause—Rejected Claim
WPI 155.06.02	Proximate Cause—Allowed Claim—Alternative
WPI 155.06.03	Proximate Cause—Rejected Claim—Alternative
WPI 155.07	Permanent Total Disability
WPI 155.07.01	Permanent Total Disability—Special Work
WPI 155.08	Permanent Partial Disability—Categories of Impairment
WPI 155.08.01	Permanent Partial Disability—No Categories of Impairment
WPI 155.09	Extent of Disability or Aggravation—Basis of Medical Opinion
WPI 155.10	Extent of Disability
WPI 155.11	Aggravation—Prior Award
WPI 155.11.01	Aggravation—Prior Award—Burden of Proof
WPI 155.12	Aggravation—No Prior Award
WPI 155.12.01	Burden of Proof—Aggravation—No Prior Award
WPI 155.13	Weighing Medical and Lay Testimony
WPI 155.13.01	Testimony of Attending Physician
WPI 155.14	Special Verdict—Workers' Compensation
WPI 155.20	Lighting Up of Pre-Existing, Asymptomatic Condition

WPI 155.21 Worsening of Pre-Existing, Symptomatic Condition
WPI 155.25 Injury to Particular Worker
WPI 155.30 Occupational Disease—Definition
WPI 155.31 Treatment—Definition

WPI 155.00

INTRODUCTION

The workers' compensation instructions were first published in 1972. Since that time, the WPI Committee has not significantly revised the numbering of these instructions. Experience with the instructions has shown that the instruction numbers do not necessarily correspond with the sequence in which these instructions are normally presented to the jury. The WPI Committee has set forth in Appendix E (section 4) a general sequence of instructions contained in the WPI, adaptable to most common types of workers' compensation cases.

[Current as of November 2016.]

WPI 155.01

CONCLUSION OF TRIAL—INTRODUCTORY INSTRUCTION

It is your duty to decide the facts in this case based upon the evidence presented to you during this trial. It also is your duty to accept the law as I explain it to you, regardless of what you personally believe the law is or what you personally think it should be. You must apply the law from my instructions to the facts that you decide have been proved, and in this way decide the case.

The evidence that you are to consider during your deliberations consists of the testimony that has been read to you from the certified Appeal Board record [, and the exhibits that have been admitted].

[Exhibits may have been marked by the court clerk and given a number, but they do not go with you to the jury room during your deliberations unless they have been admitted into evidence. The exhibits that have been admitted will be available to you in the jury room.]

In order to decide whether any party's claim has been proved, you must consider all of the evidence that relates to that claim. Each party is entitled to the benefit of all of the evidence, whether or not that party introduced it.

You are the sole judges of the credibility of each witness and of the value or weight to be given to the testimony of each witness. In assessing credibility, you must avoid bias, conscious or unconscious, including bias based on religion, ethnicity, race, sexual orientation, gender or disability.

In considering a witness's testimony, you may consider these things: the opportunity of the witness to observe or know the things they testify about; the ability of the witness to observe accurately; the quality of a

witness's memory while testifying; the manner of the witness while testifying; any personal interest that the witness might have in the outcome or the issues; any bias or prejudice that the witness may have shown; the reasonableness of the witness's statements in the context of all of the other evidence; and any other factors that affect your evaluation or belief of a witness or your evaluation of his or her testimony.

[One of my duties has been to rule on the admissibility of evidence. Do not be concerned during your deliberations about the reasons for my rulings on the evidence. If I have ruled that any evidence is inadmissible, or if I have asked you to disregard any evidence, then you must not discuss that evidence during your deliberations or consider it in reaching your verdict.]

The law does not permit me to comment on the evidence in any way. I would be commenting on the evidence if I indicated my personal opinion about the value of testimony or other evidence. Although I have not intentionally done so, if it appears to you that I have indicated my personal opinion, either during trial or in giving these instructions, you must disregard it entirely.

As to the comments of the lawyers during this trial, they are intended to help you understand the evidence and apply the law. However, it is important for you to remember that the lawyers' remarks, statements, and arguments are not evidence. You should disregard any remark, statement, or argument that is not supported by the evidence or the law as I have explained it to you.

You may have heard objections made by the lawyers during trial. Each party has the right to make objections at trial. These objections should not influence you. Do not make any assumptions or draw any conclusions based on a lawyer's objections.

As jurors, you have a duty to consult with one an-

other and to deliberate with the intention of reaching a verdict. Each of you must decide the case for yourself, but only after an impartial consideration of all of the evidence with your fellow jurors. Listen to one another carefully. In the course of your deliberations, you should not hesitate to re-examine your own views and to change your opinion based upon the evidence. You should not surrender your honest convictions about the value or significance of evidence solely because of the opinions of your fellow jurors. Nor should you change your mind just for the purpose of obtaining enough votes for a verdict.

As jurors, you are officers of this court. You must not let your emotions overcome your rational thought process. You must reach your decision based on the facts proved to you and on the law given to you, not on sympathy, prejudice, or personal preference. To assure that all parties receive a fair trial, you must act impartially with an earnest desire to reach a proper verdict.

Finally, the order of these instructions has no significance as to their relative importance. They are all important. In closing arguments, the lawyers may properly discuss specific instructions, but you must not attach any special significance to a particular instruction that they may discuss. During your deliberations, you must consider the instructions as a whole.

NOTE ON USE

Give this instruction in every workers' compensation case. This instruction is the first of the written final instructions given to the jury at the end of the trial.

Use bracketed language as appropriate.

COMMENT

In this edition, the WPI Committee has added an admonition that the jurors must not let bias, conscious or unconscious, influence their assessment of credibility. For further discussion of conscious or unconscious bias, see the Comment to WPI 1.01 (Advance Oral Instruction—Beginning of Proceeding).

For additional commentary on this pattern instruction, see WPI 1.02 (Conclusion of Trial—Introductory Instruction).

[Current as of March 2018.]

WPI 155.01.01

EVIDENCE LIMITED TO RECORD

The law requires that this case be tried solely on the evidence and testimony that was offered before the Board of Industrial Insurance Appeals. This means that the parties are not permitted to bring witnesses into court and have them testify before you. The evidence that you are to consider is limited to that contained in the record.

You should give no consideration to the presence or absence of any party. [Any impression you may gain from observing any party during the trial shall not be considered as evidence.]

NOTE ON USE

The WPI Committee recommends that this explanation be given at some time prior to the reading of the record to the jury. This instruction should also be included in the written instructions to the jury. A preliminary statement may also be read to the jury that describes in more detail the order of proceedings in a workers' compensation appeal.

The bracketed sentence in the second paragraph applies if any party attends the trial.

COMMENT

RCW 51.52.115 sets out the procedure at trial upon appeal to the superior court.

Because jurors are not to consider any new evidence in the case, they should not consider any impressions they may gather from observing any parties who attend the trial.

[Current as of November 2016.]

WPI 155.02

BOARD'S FINDINGS

This is an appeal from the findings and decision of the Board of Industrial Insurance Appeals. The Board made the following material findings of fact:

(Here insert the Board's material findings.)

By informing you of these findings, the court does not intend to express any opinion on the correctness or incorrectness of the Board's findings.

NOTE ON USE

This instruction should be given in every case.

COMMENT

RCW 51.52.115.

The statute requires that the exact findings of the Board on each material issue be given in the form of an instruction to the jury. The cases below discuss what constitutes a material finding of fact for this purpose, and confirm that the instruction should include only those findings deemed material by the trial court.

Jurisdictional finding. The Board's first finding of fact is commonly called the jurisdictional finding. Although contained in the Certified Appeal Board Record provided to the court, the jurisdictional history document is generally not an exhibit for consideration by the jury. Unless there is a fact in dispute that affects the Board's jurisdiction, such as the date a document was communicated to a party, it may be unnecessary to include the Board's first finding in this instruction.

On occasion, a more detailed recitation of history may be set out in the first finding when references in testimony read to the jury relate to prior adjudication of the claim and/or the results of prior litigation. When a more expanded jurisdictional finding is present, it must be kept in mind that Gaines v. Department of Labor and Industries, 1 Wn.App. 547, 551–52, 463 P.2d 269 (1969), disapproved providing the jury with findings other than those pertaining to the "ultimate fact[s]" of the case, including "recitals of summaries of evidence." Also, in McDonald v. Department of Labor and Industries, 104 Wn.App. 617, 624, 17 P.3d

1195 (2001), the court approved an instruction directing the jury to disregard any action of opening or closing the claim.

In Stratton v. Department of Labor and Industries, 1 Wn.App. 77, 459 P.2d 651 (1969), it was held reversible error to give an instruction that sets forth a hearing examiner's rejected decision as a finding of the Board. The court noted that the trial court is required to advise the jury only of the exact findings pertaining to each material issue before the court; it is not required to instruct the jury on all matters that may have been denominated "findings" by the Board. To the same effect, see Nash v. Department of Labor and Industries, 1 Wn.App. 705, 462 P.2d 988 (1969).

Other non-material findings. "Evidentiary commentary" may properly be excised from the Board's findings as long as the revision does not change the "ultimate fact-finding." Wendt v. Dep't. of Labor & Indus., 18 Wn.App. 674, 685, 571 P.2d 229 (1977).

In Stratton v. Department of Labor and Industries, 7 Wn.App. 652, 501 P.2d 1072 (1972), the court held that it is reversible error to include in the jury instructions comments on the claimant's behavior that are not supported by the evidence.

Commonly, only the Board's specifically-denominated findings of fact are presented in this instruction. However, the WPI Committee notes that, occasionally, the Board's conclusions of law, or the body of its decision, may actually include a finding of fact. If the court finds that inclusion of such information as a finding of fact is necessary to properly present the material issue to the jury, such information should be framed in this instruction as a finding of the Board. Gaines v. Dep't of Labor & Indus., 1 Wn.App. 547, 463 P.2d 269 (1969).

[Current as of November 2016.]

WPI 155.02.01

ISSUES

(Name of party) **claims that the findings and decision of the Board are incorrect in that:**

(Set forth in simple form the exact issues raised or claims asserted by the appealing party and the contentions of the responding party when appropriate. These should avoid undue emphasis or repetition or restatement of the findings.)

NOTE ON USE

This instruction should be adapted to fit the facts of the case. The opposing party may propose an issue or contention instruction—particularly when there is a cross appeal.

COMMENT

In many cases a simple and clear statement of the exact contentions of the parties may be helpful even though WPI 155.02 (Board's Findings) has set forth specific Board findings as required by RCW 51.52.115.

For example, the contentions in a case might be phrased:

(1) Jane Doe contends that she sustained an industrially-related hearing loss as a result of exposure to noise during her employment with Widget Corporation.

(2) The [Department] [and] [Widget Corporation] contend[s] that Jane Doe had a hearing loss that pre-existed her employment with Widget Corporation and that any increase in her hearing loss during such employment resulted from the progression of an unrelated neurological condition.

Practitioners should carefully draft the statement of contentions to accurately describe the Board's conclusions of law and applicable statutes. For example, a jury instruction patterned after WPI 155.02.01 was held to be erroneous because it described a party's contention regarding temporary total disability in terms of whether the worker's condition had returned to pre-injury status, when the applicable standard under RCW 51.32.090 is whether earning capacity has been

restored. Chunyk & Conley/Quad-C v. Bray, 156 Wn.App. 246, 255–56, 232 P.3d 380 (2010).

It may also be important to instruct the jury on the parties' stipulations as well as their contentions. The *Bray* court reversed the trial court for failing to include in its instructions the parties' stipulation regarding the conditions that resulted from the injury, thereby allowing the jury to speculate that an accepted condition was not, in fact, a residual of the injury. For further discussion of stipulations in civil cases, see WPI 6.10.01 (Stipulations).

[Current as of November 2016.]

WPI 155.03

BURDEN OF PROOF

The findings and decision of the Board of Industrial Insurance Appeals are presumed correct. This presumption is rebuttable, and it is for you to determine whether it is rebutted by the evidence. The burden of proof is on (name of appellant) **to establish by a preponderance of the evidence that the decision is incorrect.**

When it is said that a party has the burden of proof on any proposition, or that any proposition must be proved by a preponderance of the evidence, or the expression "if you find" is used, it means that you must be persuaded, considering all the evidence in the case [bearing on the question], that the proposition on which that party has the burden of proof is more probably true than not true.

NOTE ON USE

This instruction should be given in every case. The last paragraph is the same as WPI 21.01 (Meaning of Burden of Proof—Preponderance of the Evidence).

COMMENT

RCW 51.52.115 provides that the board's findings and decision shall be "prima facie" correct. This was interpreted to mean that there is a presumption on appeal that the findings and decision are correct until the trier of fact determines they are incorrect by a preponderance of the evidence. Allison v. Department of Labor and Industries, 66 Wn.2d 263, 401 P.2d 982 (1965). See also McClelland v. ITT Rayonier, Inc., 65 Wn.App. 386, 828 P.2d 1138 (1992), and Belnap v. Boeing Company, 64 Wn.App. 212, 823 P.2d 528 (1992). The court in Harrison Mem'l Hosp. v. Gagnon, 110 Wn.App. 475, 40 P.3d 1221 (2002), affirmed the principle that when the claimant has prevailed before the Board, the claimant does not carry an additional burden of proof before the superior court, and that the burden of proof is solely on the appealing party.

In an employer's appeal, the court held that the burden of proving that a decision of the board is erroneous is sustained by demonstrating that there is not enough evidence to support it. Kaiser Aluminum &

Chemical Corp. v. Department of Labor and Industries, 43 Wn.2d 584, 262 P.2d 536 (1953).

[Current as of November 2016.]

WPI 155.04

EXPLANATION OF THE INDUSTRIAL INSURANCE SYSTEM

This case is brought pursuant to the Industrial Insurance Act. The purpose of the Industrial Insurance Act is to provide benefits to workers and their dependents for disabilities or deaths caused by industrial injuries or occupational diseases.

The Department of Labor and Industries is the state agency that administers the Industrial Insurance Act. It is the Department's duty to determine what benefits are to be provided to a worker under the Industrial Insurance Act and to issue all orders relating to claims under the Act.

Once the Department makes a determination regarding a worker's benefits, those benefits are provided [either] from a fund that is administered by the Department from premiums collected from employers and employees statewide [or by the worker's employer, if the employer is certified by the Department to be self-insured. The employer in this case is a self-insured employer].

The Board of Industrial Insurance Appeals is a separate state agency that is independent of the Department of Labor and Industries. It is the Board's function to review the Department's determinations when there is an appeal by interested parties.

NOTE ON USE

This instruction should be included in the court's written instructions to the jury. This instruction may also be given as part of the court's oral instructions to the jury at the beginning of the case.

The bracketed portion of the third paragraph of this instruction should be given when the employer is self-insured.

COMMENT

RCW 51.04.020 invests the Department of Labor and Industries with the responsibility for administering the Industrial Insurance Act.

[Current as of November 2016.]

WPI 155.05

NEGLIGENCE NOT AN ISSUE

The Industrial Insurance Act applies regardless of fault or negligence. Therefore, in resolving the issues before you, you are not to consider fault or negligence, if any, of the employer or the worker [or any other person or entity].

NOTE ON USE

It is recommended that this explanation be given at some time prior to the reading of the record to the jury. This instruction may also be included in the written instructions to the jury. This instruction may not be applicable in all cases. See the Comment below.

Use the bracketed language if the evidence could lead jurors to consider the negligence or fault of some other person or entity, such as a co-worker.

COMMENT

RCW 51.04.010 provides that the Industrial Insurance Act applies without regard to fault.

This instruction may not be applicable in all cases. For example, in a case in which aggravation is asserted subsequent to an award, the reasonableness of the claimant's conduct after the award may become an issue. See McDougle v. Dep't of Labor & Indus., 64 Wn.2d 640, 393 P.2d 631 (1964).

[Current as of November 2016.]

WPI 155.06

PROXIMATE CAUSE—ALLOWED CLAIM

The term "proximate cause" means a cause which in a direct sequence [, unbroken by any new independent cause,] produces the [condition] [disability] [death] complained of and without which such [condition] [disability] [death] would not have happened.

[There may be one or more proximate causes of a [condition] [disability] [death]. For a worker to recover benefits under the Industrial Insurance Act, the [industrial injury] [occupational disease] must be a proximate cause of the alleged [condition] [and] [disability] [death] for which benefits are sought. The law does not require that the [industrial injury] [occupational disease] be the sole proximate cause of such [condition] [disability] [death].]

NOTE ON USE

Use this definition of proximate cause when defining proximate cause in a case involving an allowed claim. For an alternative wording of this instruction, see WPI 155.06.02 (Proximate Cause—Allowed Claim—Alternative).

Use WPI 155.06.01 (Proximate Cause—Rejected Claim) or its alternative instruction (WPI 155.06.03) when defining proximate cause in a case involving a rejected claim.

Use bracketed material as applicable. Use the bracketed second paragraph if the evidence presents an issue of multiple causes. See the Comment below. Use the bracketed word "and" in the second sentence of the second paragraph if there is a claim for both an alleged condition and a disability. If the claim is by a surviving spouse or other beneficiary, the term "worker" should be appropriately changed.

COMMENT

Multiple proximate causes. In Wendt v. Department of Labor and Industries, 18 Wn.App. 674, 571 P.2d 229 (1977), the court held that it is error not to give an instruction on multiple proximate causes when there is evidence to support a theory that the disability resulted from the combined effects of the industrial injury and other unrelated conditions.

The court in City of Bremerton v. Shreeve, 55 Wn.App. 334, 777 P.2d 568 (1989), held that the trial court did not err in giving an instruction adapted from WPI 155.06 that set forth a "multiple proximate cause theory" in an occupational disease case. However, the court cautioned that it is "preferable" to avoid the use of multiple proximate cause instructions in occupational disease cases when possible. The court stated these instructions could be misleading to a jury confronted with a disability to which several preexisting medical conditions have contributed, but which conditions did not arise out of the claimant's employment. City of Bremerton v. Shreeve, 55 Wn.App. at 340–41. The court stated that it believed:

> [I]t would be better practice to present instructions which, after defining proximate cause as set forth in the first paragraph of WPI 155.06, convey the idea that the worker is to be taken as he or she is, and a preexisting condition should not be considered a "cause" of the injury, but merely a condition upon which the "proximate cause" operated.

City of Bremerton v. Shreeve, 55 Wn.App. at 341.

Notwithstanding the statement in *Shreeve* discouraging the use of multiple proximate cause instructions in occupational disease cases, it is advisable to give the second paragraph of WPI 155.06 if the evidence presents an issue of multiple causes. Under *Wendt* it is probably reversible error if this paragraph is not given, while under *Shreeve* it is not error if it is given.

In Dennis v. Department of Labor and Industries, 109 Wn.2d 467, 745 P.2d 1295 (1987), the Supreme Court sought to clarify the statutory requirement that the occupational disease arise "naturally and proximately" out of the employment. Noting that an occupational disease must arise both "naturally" and "proximately" out of employment, the court stated that the term "naturally" must be construed in its ordinary sense and must be tied to the "arising out of employment" language in RCW 51.08.140. The court further stated:

> We hold that a worker must establish that his or her occupational disease came about as a matter of course as a natural consequence or incident of distinctive conditions of his or her particular employment. The conditions need not be peculiar to, nor unique to, the worker's particular employment. Moreover, the focus is upon conditions giving rise to the occupational disease, or the disease-based disability resulting from work-related aggravation of a nonwork-related disease, and not upon whether the disease itself is common to that particular employment. The worker, in attempting to satisfy the "naturally" requirement, must show that his or her particular work conditions more probably caused his or her disease or disease-based disability than conditions in everyday life or all

> employments in general; the disease or disease-based disability must be a natural incident of conditions of that worker's particular employment. Finally, the conditions causing the disease or disease-based disability must be conditions of *employment*, that is, conditions of the worker's particular occupation as opposed to conditions coincidentally occurring in his or her workplace.

Dennis v. Department of Labor and Industries, 109 Wn.2d at 481, 745 P.2d at 1303 (emphasis in original). See also Favor v. Department of Labor and Industries, 53 Wn.2d 698, 336 P.2d 382 (1959); McClelland v. ITT Rayonier, Inc., 65 Wn.App. 386, 828 P.2d 1138 (1992).

Lighting-up. In McDonagh v. Department of Labor & Industries, 68 Wn.App. 749, 845 P.2d 1030 (1993), the court held that a proximate cause instruction does not serve the same purpose as a "lighting-up" instruction, and that it is reversible error not to give an instruction on a claimant's "lighting-up" theory if it is raised as an issue and there is substantial evidence to support it. Usually, "lighting-up" arises in the context of rating or treating disability. However, the *McDonagh* case discusses "lighting-up" in the context of a rejected claim.

A pattern instruction for lighting-up cases can be found at WPI 155.20 (Lighting Up of Pre-existing, Asymptomatic Condition).

[Current as of November 2016.]

WPI 155.06.01

PROXIMATE CAUSE—REJECTED CLAIM

The term "proximate cause" means a cause which in a direct sequence [, unbroken by any new independent cause,] produces the [condition] [disability] [death] complained of and without which such [condition] [disability] [death] would not have happened.

[There may be one or more proximate causes of a [condition] [disability] [death]. For a worker to be entitled to benefits under the Industrial Insurance Act, the [work conditions] [incident] must be a proximate cause of the alleged [condition] [disability] [death] for which entitlement to benefits is sought. The law does not require that the [work conditions] [incident] be the sole proximate cause of such [condition] [disability] [death].]

NOTE ON USE

Use this definition when defining proximate cause in a case involving a rejected claim. For an alternative wording of this instruction, see WPI 155.06.03 (Proximate Cause—Rejected Claim—Alternative).

Use WPI 155.06 (Proximate Cause—Allowed Claim), or its alternative instruction (WPI 155.06.02), when defining proximate cause in a case involving an allowed claim.

Use bracketed material as applicable. Use the bracketed second paragraph if the evidence presents an issue of multiple causes. If the claim is by a surviving spouse or other beneficiary, the term "worker" should be appropriately changed. Use the bracketed words "work conditions" when the claim is for an occupational disease. Use the bracketed word "incident" when the claim is for an injury.

COMMENT

For a general discussion of proximate cause requirements in a workers' compensation case see the Comment to WPI 155.06 (Proximate Cause—Allowed Claim).

[Current as of November 2016.]

WPI 155.06.02

PROXIMATE CAUSE—ALLOWED CLAIM—ALTERNATIVE

A cause of a [condition] [disability] [death] is a proximate cause if it is related to the [condition] [disability] [death] in two ways: (1) the cause produced the [condition] [disability] [death] in a direct sequence [unbroken by any new, independent cause], and (2) the [condition] [disability] [death] would not have happened in the absence of the cause.

[There may be one or more proximate causes of a [condition] [disability] [death]. For a worker to recover benefits under the Industrial Insurance Act, the [industrial injury] [occupational disease] must be a proximate cause of the alleged [condition] [and] [disability] [death] for which benefits are sought. The law does not require that the [industrial injury] [occupational disease] be the sole proximate cause of such [condition] [disability] [death].]

NOTE ON USE

This instruction is an alternative to the tradition definition of proximate cause found in WPI 155.06 (Proximate Cause—Allowed Claim). For directions on using this instruction, see the Note on Use and Comment to WPI 155.06 (Proximate Cause—Allowed Claim).

COMMENT

This instruction is an alternative version of WPI 155.06 (Proximate Cause—Allowed Claim) in the same manner that WPI 15.01.01 (Proximate Cause—Definition—Alternative) is an alternative version of WPI 15.01 (Proximate Cause—Definition). For an explanation of the derivation of the language in this instruction's first paragraph, see the Comment to WPI 15.01.01 (Proximate Cause—Definition—Alternative).

[Current as of November 2016.]

WPI 155.06.03

PROXIMATE CAUSE—REJECTED CLAIM—ALTERNATIVE

A cause of a [condition] [disability] [death] is a proximate cause if it is related to the [condition] [disability] [death] in two ways: (1) the cause produced the [condition] [disability] [death] in a direct sequence [unbroken by any new, independent cause], and (2) the [condition] [disability] [death] would not have happened in the absence of the cause.

[There may be one or more proximate causes of a [condition] [disability] [death]. For a worker to be entitled to benefits under the Industrial Insurance Act, the [work conditions] [incident] must be a proximate cause of the alleged [condition] [disability] [death] for which entitlement to benefits is sought. The law does not require that the [work conditions] [incident] be the sole proximate cause of such [condition] [disability] [death].]

NOTE ON USE

This instruction is an alternative to the traditional definition of proximate cause found in WPI 155.06.01 (Proximate Cause—Rejected Claim). For directions on using this instruction, see the Note on Use and Comment to WPI 155.06.01 (Proximate Cause—Rejected Claim).

COMMENT

This instruction is an alternative version of WPI 155.06.01 (Proximate Cause—Rejected Claim) in the same manner that WPI 15.01.01 (Proximate Cause—Definition—Alternative) is an alternative version of WPI 15.01 (Proximate Cause—Definition). For an explanation of the derivation of the language in this instruction's first paragraph, see the Comment to WPI 15.01.01 (Proximate Cause—Definition—Alternative).

[Current as of November 2016.]

WPI 155.07

PERMANENT TOTAL DISABILITY

Total disability is an impairment of mind or body that renders a worker unable to perform or obtain a gainful occupation with a reasonable degree of success and continuity. It is the loss of all reasonable wage-earning capacity.

A worker is totally disabled if [he] [she] is unable to perform or obtain regular gainful employment as a result of an [industrial injury] [occupational disease]. A determination of total disability should be made by giving consideration to the individual worker's weaknesses and strengths, age, education, training and experience, [any permanent loss of function which pre-existed the [industrial injury] [occupational disease]] and any permanent loss of function that was proximately caused by the [industrial injury] [occupational disease].

A worker is not totally disabled solely because of inability to return to the worker's former occupation. However, total disability does not mean that the worker must have become physically or mentally helpless.

Total disability is permanent when it is reasonably probable to continue for the foreseeable future.

NOTE ON USE

Use this instruction in permanent total disability cases when there is an issue whether the industrial injury or occupational disease has rendered the worker permanently totally disabled. Use WPI 155.07.01 (Permanent Total Disability—Special Work) with this instruction if there is an issue whether the injury restricts the worker to odd jobs or to special work not generally available.

COMMENT

RCW 51.08.160. The revised language comes from Fochtman v. Dep't of Labor & Indus., 7 Wn.App. 286, 499 P.2d 255 (1972) and was

approved in Leeper v. Dep't of Labor & Indus., 123 Wn.2d 803, 872 P.2d 507 (1994).

The statute defines permanent total disability as meaning "loss of both legs, arms, or one leg and one arm, total loss of eyesight, paralysis or other condition permanently incapacitating the worker from performing any work at any gainful occupation." When a worker claims permanent total disability but does not suffer any of the disabilities specified in the statute, the inquiry becomes whether the injury permanently incapacitates the worker "from performing any work at any gainful occupation." Allen v. Dep't of Labor & Indus., 30 Wn.App. 693, 638 P.2d 104 (1981).

The statutory language that the condition must permanently incapacitate "the worker from performing any work at any gainful occupation" does not mean that the worker must be physically or mentally helpless for all purposes except to live. The intent of the act is to insure against loss of wage earning capacity. A worker's wage earning capacity may be destroyed although the worker still has the capacity to accomplish minor tasks. Kuhnle v. Dep't of Labor & Indus., 12 Wn.2d 191, 120 P.2d 1003 (1942). Also see Spring v. Dep't of Labor & Indus., 96 Wn.2d 914, 640 P.2d 1 (1982); Nash v. Dep't of Labor & Indus., 1 Wn.App. 705, 462 P.2d 988 (1969).

A prima facie case of total disability can be made: when it is established that a worker was able to work prior to injury and is unable to do so after injury because of pain and the nature of the injury; when medical experts have testified to the loss of function and limitations on the ability to work; and when vocational experts have concluded that the worker is not employable in the competitive labor market. Spring v. Dep't of Labor & Indus., 96 Wn.2d 914, 640 P.2d 1 (1982); Fochtman v. Dep't of Labor & Indus., 7 Wn.App. 286, 499 P.2d 255 (1972).

For a discussion of the differences between permanent and temporary total disability, see Wilson v. Dep't of Labor & Indus., 6 Wn.App. 902, 496 P.2d 551 (1972), and Bonko v. Dep't of Labor & Indus., 2 Wn.App. 22, 466 P.2d 526 (1970). In Washington Irrigation and Development Co. v. Sherman, 106 Wn.2d 685, 724 P.2d 997 (1986), the court held that WPI 155.07 as presented in the second edition of the WPI is a correct statement of the law and that the trial court did not err in refusing the worker's proposed instruction that referred to the "whole man theory of total disability."

The inclusion of the phrase "or obtain" in this instruction was specifically upheld in Leeper v. Dep't of Labor & Indus., 123 Wn.2d 803, 872 P.2d 507 (1994), disapproving the analysis in Graham v. Weyerhaeuser Company, 71 Wn.App. 55, 856 P.2d 717 (1993). The court pointed

out that "[t]he language of the statute acknowledges proof of a disability will evolve with the development of new industries, the sophistication of medical diagnoses and treatment, and the changing composition of the labor market." Leeper v. Dep't of Labor & Indus., 123 Wn.2d at 811. In a case in which such factors take on particular relevance, it may be appropriate to instruct further on them. Board of Industrial Insurance Appeals decisions, while not precedential, may provide helpful guidance in this regard.

The court in *Leeper* employed the phrase "reaction to the injury." The WPI Committee has recommended the phrase "and loss of function resulting from the [industrial injury] [occupational disease]" to encompass this concept.

In Adams v. Dep't of Labor & Indus., 128 Wn.2d 224, 231–33, 905 P.2d 1220 (1995), (discussing Turner v. Dep't of Labor & Indus., 41 Wn.2d 739, 251 P.2d 883 (1953)) (in which a worker was found to be permanently totally disabled even though he was working at the time of claim closure), the court reasoned that work that causes serious discomfort or pain or endangers the health of the worker is not "sustainable" and supported an argument that his earning power was impaired, thus the question of permanent total disability was appropriately a jury question. The bracketed language should be added only if there is evidence limiting work activities due to serious discomfort or pain or due to endangerment of the worker's life or health.

[Current as of November 2016.]

WPI 155.07.01

PERMANENT TOTAL DISABILITY—SPECIAL WORK

If, as a result of an [industrial injury] [occupational disease], a worker is able to perform only odd jobs or special work not generally available, then the worker is totally disabled, unless the [Department] [employer] proves by a preponderance of the evidence that odd jobs or special work that he or she can perform is available to the worker [in the relevant labor market] on a reasonably continuous basis.

NOTE ON USE

Use bracketed material as applicable. Use this instruction, with WPI 155.07 (Permanent Total Disability) if there is an issue of whether the injury restricts the worker to odd jobs or to special work not generally available. When it would be helpful to the jury in resolving issues in the case, further instruction may be necessary clarifying the particular worker's relevant labor market. See the Comment below.

COMMENT

RCW 51.08.160.

This instruction is taken from Allen v. Dep't of Labor and Indus., 16 Wn.App. 692, 559 P.2d 572 (1977). It is error to refuse a "special work" instruction when the evidence warrants it. Wendt v. Dep't of Labor and Indus., 18 Wn.App. 674, 571 P.2d 229 (1977).

If the injury or disease leaves a worker in such a condition that the worker can no longer follow his or her previous occupation or any other similar occupation, and is fitted only to perform "odd jobs" or special work not generally available, "the burden is on the department [or insurer] to show that there is a type of work that [the worker] can in fact obtain." Kuhnle v. Dep't of Labor and Indus., 12 Wn.2d 191, 198–99, 120 P.2d 1003, 1007 (1942). Also see Spring v. Dep't of Labor and Indus., 96 Wn.2d 914, 640 P.2d 1 (1982); Hiatt v. Dep't of Labor and Indus., 48 Wn.2d 843, 297 P.2d 244 (1956); Wendt v. Dep't of Labor and Indus., 18 Wn.App. 674, 571, P.2d 229 (1977). Such work must be shown to be reasonably continuous employment and not temporary in nature. Allen v. Dep't of Labor and Indus., 30 Wn.App. 693, 638 P.2d 104 (1981).

A fitness for odd jobs or special work negates a claim for total disability only when it is shown that such work is available to the worker

in the worker's relevant labor market, a concept implicating geographic and other practical considerations.

In a case involving questions of the scope of a worker's relevant labor market, an additional instruction may need to be drafted to aid the jury. For the geographic component, reference may be made to WAC 296-19A-010(4) and pertinent decisions of the Board of Industrial Insurance Appeals. Other pertinent practical considerations could also be enumerated for the jury to explain what is sometimes referred to as the "competitive labor market" (i.e., the real world of employment as opposed to the purely theoretical description of jobs).

For a discussion of the difference between general work and special work, see Graham v. Weyerhaeuser Company, 71 Wn.App. 55, 856 P.2d 717 (1993), overruled on other grounds, Leeper v.Dep't of Labor & Indus., 123 Wn.2d 803, 872 P.2d 507 (1994). The court differentiated "special work" from "general work" by characterizing general work as work that is generally available in the labor market while special work is not generally available.

[Current as of November 2016.]

WPI 155.08

PERMANENT PARTIAL DISABILITY—CATEGORIES OF IMPAIRMENT

Permanent partial disability is a loss of bodily function to a part or parts of the body, proximately caused by the [industrial injury] [occupational disease].

If the part of the body involved is a part that cannot be amputated, then loss of bodily function is measured by levels called "categories of impairment." Assessment of loss of bodily function is made by comparing the condition of the injured worker with the conditions described in the categories and selecting the most appropriate category.

Based on the evidence, select the one category that most accurately indicates the level of permanent impairment proximately caused by the [industrial injury] [occupational disease] for each area of the body listed. When more than one category may be applicable to impairment of a given area of the body, select the category that most accurately reflects the overall level of impairment of that area.

The following categories are to be compared in this case:

(Insert applicable WAC categories.)

NOTE ON USE

Use this instruction for injuries occurring, and occupational diseases deemed to have arisen, after October 1, 1974 for which a category rating system exists. To determine the date upon which an occupational disease is deemed to have arisen, see the Comment.

Use WPI 155.08.01 (Permanent Partial Disability—No Categories of Impairment) for (1) injuries occurring and occupational diseases deemed to have arisen between July 1, 1971, and October 1, 1974, and (2) injuries or diseases arising thereafter if they involved only condi-

tions that have not been assigned a category and must be rated as a percentage of amputation value or total bodily impairment.

If the case involves, in addition to a condition ratable by category, a condition ratable by comparison to amputation value or by comparison to total bodily impairment, instructions for both rating systems must be given using this instruction as well as WPI 155.08.01 (Permanent Partial Disability—No Categories of Impairment), with appropriate modifications.

Do not use this instruction for cases involving loss of sight or hearing only. If mental disability is involved, or the case is an aggravation case, this instruction will also have to be modified.

Use bracketed material as applicable.

COMMENT

RCW 51.32.080; WAC 296-20-220.

Permanent partial and permanent total disability are two separate concepts. See Ellis v. Dep't of Labor & Indus., 88 Wn.2d 844, 567 P.2d 224 (1977). The determination to be made by the jury in establishing permanent partial disability is whether the worker has suffered a loss of bodily function, whereas permanent total disability involves a determination whether the worker's earning capacity is lost as a result of an occupational injury or disease. See Franks v. Dep't of Labor & Indus., 35 Wn.2d 763, 215 P.2d 416 (1950); Fochtman v. Dep't of Labor & Indus., 7 Wn.App. 286, 499 P.2d 255 (1972). It is error to consider loss of earning power in fixing a permanent partial disability award. Cayce v. Dep't of Labor & Indus., 2 Wn.App. 315, 467 P.2d 879 (1970).

RCW 51.32.080(3) directs the Department of Labor and Industries to establish rules classifying permanent partial disabilities in proportion to total bodily impairment. Pursuant to this direction the Department has promulgated a categorical rating system found at WAC 296-20-200 et seq. to be used by physicians for specified disabilities. The regulations establishing these categories were upheld in Brannan v. Dep't of Labor & Indus., 104 Wn.2d 55, 700 P.2d 1139 (1985), and Vliet v. Dep't of Labor & Indus., 30 Wn.App. 709, 638 P.2d 112 (1981). Moreover, it is not error to instruct that disability is to be determined according to the categories set forth in WAC 296-20-200 et seq. Vliet v. Dep't of Labor & Indus., 30 Wn.App. 709. If the WAC categories are to be used by the jury in determining disability, appropriate instructions must be provided to the jury that set forth the categories.

In actions involving the loss of sight or hearing, the jury should be instructed under RCW 51.32.080(2) to determine the percentage of loss of sight or hearing. In actions involving disabilities for which no cate-

gory, amputation value, or other special rating method is specified, a rating for unspecified disability is done by comparison to total bodily impairment. See WPI 155.08.01 (Permanent Partial Disability—No Categories of Impairment). Persistent variable respiratory impairment was ratable under WAC 296-20-370(1)(d) as a percentage of total bodily impairment prior to March 1, 1994. If an action involves an "aggravated" injury or disease, see WPI 155.11 (Aggravation—Prior Award) or WPI 155.12 (Aggravation—No Prior Award).

WAC 296-20-220 provides guidance for the selection of categories of impairment. Further instruction in this regard is left to the discretion of the judge.

To determine the date when an occupational disease is deemed to have arisen, see RCW 51.32.180 and WAC 296-14-350. See also Dep't of Labor & Indus. v. Landon, 117 Wn.2d 122, 814 P.2d 626 (1991).

For the applicability of this instruction when total permanent disability is also in issue, see Allison v. Dep't of Labor & Indus., 66 Wn.2d 263, 401 P.2d 982 (1965); Dowell v. Dep't of Labor & Indus., 51 Wn.2d 428, 319 P.2d 843 (1957); and Orr v. Dep't of Labor & Indus., 10 Wn.App. 697, 519 P.2d 1334 (1974).

WAC 296-20-220(1)(g) provides in part that when more than one category may be applicable, the category that most accurately reflects the overall level of impairment shall be selected.

This instruction was formerly numbered WPI 155.08.01.

[Current as of November 2016.]

WPI 155.08.01

PERMANENT PARTIAL DISABILITY—NO CATEGORIES OF IMPAIRMENT

Permanent partial disability is a loss of bodily function to a part or parts of the body, proximately caused by the [industrial injury] [occupational disease].

Disability is measured by actual loss of a specific part or parts of the body if actual amputation has occurred. If the part of the body involved is a part that could be amputated but no amputation has occurred, then the disability is measured in terms of percentage of loss of function of that particular part or parts of the body. [If the part of the body involved is a part that cannot be amputated, then the loss of bodily function may be expressed as a percentage of total bodily impairment.] [Total bodily impairment is the loss of physical or mental function which is essentially complete, short of death.]

Permanent partial disability is a measure of loss of bodily function only. In evaluating permanent partial disability, the ability or inability to carry on the worker's usual occupation as well as other limitations may be considered insofar as they reflect loss of bodily function.

NOTE ON USE

Use this instruction for industrial injuries occurring or occupational diseases deemed to have arisen between July 1, 1971 and October 1, 1974, and for injuries or diseases arising thereafter involving only conditions that must be rated as a percentage of amputation value or total bodily impairment.

Use WPI 155.08 (Permanent Partial Disability—Categories of Impairment) for industrial injuries occurring or occupational diseases deemed to have arisen after October 1, 1974 for which a category rating system exists.

Use bracketed material as applicable. Use of the bracketed phrase defining total bodily impairment depends upon the user's decision as to the legal issue presented in the Comment.

Do not use this instruction for cases involving loss of sight or hearing only. If mental disability is involved, this instruction must be modified. In an aggravation case, this instruction will also have to be modified.

COMMENT

RCW 51.32.080 formerly provided that loss of bodily function be expressed as a percentage of total bodily impairment for permanent partial disability not involving amputations. The phrase "total bodily impairment" was not defined in the statute.

The bracketed sentence in this instruction defining "total bodily impairment" is derived from WAC 296-20-220(1)(d). Although legal arguments have been raised as to the validity of this specific definition, no appellate decision to date has addressed this issue or the issue of whether this definition is appropriate for a jury instruction. The WPI Committee takes no position on either issue.

See the Comment accompanying WPI 155.08 (Permanent Partial Disability—Categories of Impairment) for a general discussion of permanent partial disability.

This instruction was formerly numbered 155.08 (Permanent Partial Disability).

[Current as of November 2016.]

WPI 155.09

EXTENT OF DISABILITY OR AGGRAVATION—BASIS OF MEDICAL OPINION

[The extent of (worker's name's) **industrially related physical disability] [Aggravation of** (worker's name's) **industrially related condition and the extent of** (worker's name's) **increased disability on the date of claimed aggravation] must be supported by medical testimony based at least in part upon one or more objective findings.**

Statements of complaints by the worker made to a physician are called subjective complaints. Findings of disability that can be seen, felt, or measured by an examining physician are called objective findings.

In determining [whether aggravation has occurred and] the extent of [any resulting increased] disability, a physician cannot rely solely upon complaints, but must have some objective basis for his or her opinion. On the other hand, a physician need not rely solely upon objective findings. If there are objective findings, then the physician may also consider subjective complaints.

NOTE ON USE

This instruction should be given in cases of physical disability but should not be given in cases involving mental or emotional disability, loss of hearing or sight, or postconcussion syndrome.

COMMENT

See Wilber v. Dep't of Labor & Indus., Lewis v. ITT Continental Baking Co., 93 Wn.2d 1, 603 P.2d 1262 (1979); 61 Wn.2d 439, 378 P.2d 684 (1963); and Parks v. Dep't of Labor & Indus., 46 Wn.2d 895, 286 P.2d 104 (1955).

In Price v. Dep't of Labor & Indus., 101 Wn.2d 520, 682 P.2d 307 (1984), the court held that it is improper to instruct the jury on the objective-subjective distinction in a case involving psychiatric disability.

[Current as of November 2016.]

WPI 155.10

EXTENT OF DISABILITY

You are to determine the extent of (worker's name's) **disability, if any, as it existed on or about the date that the department closed the claim, which is** (date).

COMMENT

See Hyde v. Dep't of Labor & Indus., 46 Wn.2d 31, 278 P.2d 390 (1955); Edwards v. Dep't of Labor & Indus., 43 Wn.App. 480, 717 P.2d 1377 (1986).

[Current as of November 2016.]

WPI 155.11

AGGRAVATION—PRIOR AWARD

This is an aggravation case. (worker's name's) **disability resulting from the [industrial injury] [occupational disease] was determined to be** (insert percentage or category of disability awarded) **as of** (first terminal date)**. That determination is binding on all parties.**

"Aggravation" means a worsening of a condition caused by the [industrial injury] [occupational disease] that results in [an increase in permanent disability] [a need for treatment].

The aggravation period in this case is from (date) **to** (date).

NOTE ON USE

Use this instruction if there has been a prior permanent partial disability award. In a case in which there has been no prior permanent partial disability award, use WPI 155.12 (Aggravation—No Prior Award).

Use WPI 155.11.01 (Aggravation—Prior Award—Burden of Proof) with this instruction.

Use bracketed material as applicable.

COMMENT

RCW 51.32.080(3); RCW 51.32.160.

The statute provides that a claimant is entitled to readjustment of an original disability award only upon a showing of aggravation of the claimant's condition. To establish aggravation a claimant must produce medical evidence to that effect based, at least in part, upon objective findings of a physician. See Dinnis v. Dep't of Labor & Indus., 67 Wn.2d 654, 409 P.2d 477 (1965), and Quine v. Dep't of Labor & Indus., 14 Wn.App. 340, 540 P.2d 927 (1975).

[Current as of November 2016.]

WPI 155.11.01

AGGRAVATION—PRIOR AWARD—BURDEN OF PROOF

To establish that there is [increased permanent disability] [a need for treatment] because of aggravation, the worker has the burden of proving each of the following propositions [by medical testimony based at least in part upon a comparison of objective findings]:

(1) That the aggravation resulted in [increased permanent disability] [a need for treatment];

(2) That the [increased permanent disability] [need for treatment] was proximately caused by the [industrial injury] [occupational disease]; [and]

(3) That the aggravation occurred between (date) **and** (date) **[.] [; and]**

[(4) That the disability on (date) **was greater than that for which an award was made on** (date)**.]**

NOTE ON USE

Use this instruction with WPI 155.11 (Aggravation—Prior Award), WPI 155.09 (Extent of Disability or Aggravation—Basis of Medical Opinion), WPI 155.13 (Weighing Medical and Lay Testimony), and the appropriate proximate cause definition from this chapter.

Use bracketed material as appropriate. Element (4) of this instruction may require modification or omission in cases of temporary aggravation.

COMMENT

See the Comment to WPI 155.11 (Aggravation—Prior Award).

As to whether medical testimony needs to be based on a comparison of objective findings, the WPI Committee is of the view that with the insertion of the phrase "at least in part," the instruction as currently worded calls attention to the need for a comparison while accurately

reflecting the position of the courts that "an expert medical witness may not base his opinion upon subjective symptoms alone." Kresoya v. Dep't of Labor & Indus., 40 Wn.2d 40, 45, 240 P.2d 257, 260 (1952). See also Lewis v. ITT Continental Baking, 93 Wn.2d 1, 3, 603 P.2d 1262 (1979).

[Current as of November 2016.]

WPI 155.12

AGGRAVATION—NO PRIOR AWARD

This is an aggravation case. When (worker's name)'s claim was closed on (date) it was determined that there was no permanent partial disability resulting from the [industrial injury] [occupational disease]. That determination is binding on all parties.

"Aggravation" means a worsening of a condition caused by the [industrial injury] [occupational disease] that results in [permanent disability] [a need for further treatment].

The aggravation period in this case is from (date) to (date).

NOTE ON USE

Use this instruction if plaintiff's claim has been closed at some prior time with no permanent partial disability award. In a case in which there has been a prior permanent partial disability award, use WPI 155.11 (Aggravation—Prior Award).

Use WPI 155.12.01 (Burden of Proof—Aggravation—No Prior Award) with this instruction.

Use bracketed material as applicable.

COMMENT

See White v. Dep't of Labor & Indus., 48 Wn.2d 413, 293 P.2d 764 (1956).

[Current as of November 2016.]

WPI 155.12.01

BURDEN OF PROOF—AGGRAVATION—NO PRIOR AWARD

To establish that there is [permanent disability] [a need for further treatment] because of aggravation, the worker has the burden of proving each of the following propositions [by medical testimony based at least in part upon a comparison of objective findings]:

(1) That the aggravation resulted in a [permanent disability] [need for further treatment];

(2) That the [permanent disability] [need for further treatment] was proximately caused by the [industrial injury] [occupational disease]; [and]

(3) That the aggravation occurred between (date) **and** (date) **[; and] [.]**

[(4) That the disability is greater than that determined by the Department on (date)**.]**

NOTE ON USE

Use this instruction with WPI 155.12 (Aggravation—No Prior Award), WPI 155.09 (Extent of Disability or Aggravation—Basis of Medical Opinion), WPI 155.13 (Weighing Medical and Lay Testimony), and the appropriate proximate cause instruction from this chapter.

Use bracketed material as appropriate. Element (4) of this instruction may require modification or omission in cases of temporary aggravation. Use element (4) when the appeal is to the amount of the award for the aggravation. Do not use this element if the appeal is from a denial of aggravation.

COMMENT

See the Comment to WPI 155.12 (Aggravation—No Prior Award).

See the Comment to WPI 155.11.01 (Aggravation—Prior Award—Burden of Proof) for a discussion of the phrase "by medical testimony based at least in part upon a comparison of objective findings."

WPI 155.13

WEIGHING MEDICAL AND LAY TESTIMONY

Any determination of the extent of (worker's name)'s disability must be supported by medical testimony. However, you may consider all of the testimony, both lay and medical, in evaluating (worker's name)'s disability.

NOTE ON USE

Use this instruction with WPI 155.07 (Permanent Total Disability), or WPI 155.08 (Permanent Partial Disability—Categories of Impairment), or WPI 155.08.01 (Permanent Partial Disability—No Categories of Impairment), as applicable.

Do not use this instruction with WPI 155.11 (Aggravation—Prior Award) or WPI 155.12 (Aggravation—No Prior Award).

COMMENT

See Ravsten v. Dep't of Labor & Indus., 108 Wn.2d 143, 736 P.2d 265 (1987); Sacred Heart Medical Center v. Dep't of Labor & Indus., 92 Wn.2d 631, 600 P.2d 1015 (1979); and Knowles v. Dep't of Labor & Indus., 28 Wn.2d 970, 184 P.2d 591 (1947).

This instruction was numbered WPI 155.12 in past editions of the pattern instructions.

In light of the Washington Supreme Court opinion in Hamilton v. Dep't of Labor & Indus., 111 Wn.2d 569, 761 P.2d 618 (1988), a separate instruction regarding the testimony of an attending physician has been added as WPI 155.13.01.

[Current as of November 2016.]

WPI 155.13.01

TESTIMONY OF ATTENDING PHYSICIAN

You should give special consideration to testimony given by an attending physician. Such special consideration does not require you to give greater weight or credibility to, or to believe or disbelieve, such testimony. It does require that you give any such testimony careful thought in your deliberations.

NOTE ON USE

This instruction must be used when an attending physician testifies. See Comment. Use in conjunction with WPI 155.01 (Conclusion of Trial—Introductory Instruction) and WPI 2.10 (Expert Testimony).

COMMENT

In Hamilton v. Dep't of Labor & Indus., 111 Wn.2d 569, 761 P.2d 618 (1988), the Washington Supreme Court held that the following instruction given by the trial court did not constitute an unconstitutional comment on the evidence: "In cases under the Industrial Insurance Act of the State of Washington, special consideration should be given to the opinion of the plaintiff's attending physician." The court found that this instruction did not give the personal opinion of the trial judge and that it embodied a long-standing rule of law in workers' compensation cases that special consideration should be given to the opinion of a claimant's attending physician.

In Clark County v. McManus, 185 Wn.2d 466, 372 P.3d 764 (2016), the court squarely held that use of this instruction is mandatory in workers' compensation cases when an attending physician testifies. It rejected Court of Appeals decisions suggesting otherwise. After discussing the case of Boeing Co. v. Harker-Lott, 93 Wn.App. 181, 968 P.2d 14 (1998) (which it described as "somewhat unique") the Supreme Court noted that some trial court discretion remained "in those instances where the instruction cannot be given, such as where there are multiple attending physicians offering conflicting testimony." Clark County v. McManus, 185 Wn.2d at 476 n.4.

For various types of "attending physician," see WAC 296-20-01002 ("Doctor or attending doctor").

[Current as of November 2016.]

WPI 155.14

SPECIAL VERDICT—WORKERS' COMPENSATION

(Insert caption.)

We, the jury, answer the questions submitted by the court as follows:

QUESTION 1: **Was the Board of Industrial Insurance Appeals correct in deciding that _____?**

ANSWER: _____ (Write "yes" or "no")

(DIRECTION: If you answered "yes" to Question 1, do not answer any further questions. If you answered "no" to Question 1, answer Question 2.)

QUESTION 2: **(Prepare appropriate questions relating to elements of the specific case, such as aggravation, increase in disability, etc.)**

(DIRECTION: Sign this verdict and notify the bailiff.)

DATE: _____ _____

Presiding Juror

NOTE ON USE

Use this special verdict in workers' compensation actions. The blank line in Question 1 should be completed by summarizing the ultimate conclusions of the Board of Industrial Appeals. The remaining interrogatories to the jury should consist of questions relating to the elements of the case, such as aggravation, increase in disability, etc.

COMMENT

This instruction was numbered WPI 115.13 in past editions of the pattern instructions.

[Current as of November 2016.]

WPI 155.20

LIGHTING UP OF PRE-EXISTING, ASYMPTOMATIC CONDITION

If you find that:

(1) before the [industrial injury] [occupational disease], (worker's name) had a [bodily] [mental] condition that was not disabling or requiring treatment; and

(2) because of the [industrial injury] [occupational disease] the pre-existing condition was lighted up or made active;

then (worker's name) is eligible for benefits for [his] [her] [full disability] [need for treatment] even though (worker's name)'s [disability] [need for treatment] may be greater than it would have been for a person in the same circumstances without that pre-existing condition.

[A worker may not be eligible for benefits, however, for any treatment or disabilities that resulted from the natural progression of the pre-existing condition independent of this [industrial injury] [occupational disease].]

NOTE ON USE

Use bracketed material as applicable.

Use this instruction for a pre-existing condition that was not disabling or requiring treatment before the industrial injury or occupational disease on which the claim is based. When the evidence is disputed as to the existence of such pre-existing treatment or disability, use both this instruction and WPI 155.21 (Worsening of Pre-Existing, Symptomatic Condition).

Use the last bracketed sentence only if the evidence would support a finding that some of the disability resulted from the natural progression of the condition even without the industrial injury or work exposure.

COMMENT

This instruction was first published in the 2017-2018 Supplement to 6 Washington Practice, Washington Pattern Jury Instructions: Civil (6th ed.).

This instruction deals with proximate cause. It should be given when, although there is evidence of a pre-existing condition, there is no evidence that the pre-existing condition was causing any disability or required treatment before the industrial injury occurred or the occupational disease arose.

Miller v. Dep't of Labor & Indus., 200 Wash. 674, 682–83, 94 P.2d 764 (1939), first established that a worker may recover benefits for the full disability caused by an industrial injury or occupational disease, even though the worker has a pre-existing non-work-related condition:

> [I]f an injury, within the statutory meaning, lights up or makes active a latent or quiescent infirmity or weakened physical condition occasioned by disease, then the resulting disability is to be attributed to the injury, and not to the preexisting physical condition . . .
>
> [I]f the accident or injury complained of is the proximate cause of the disability for which compensation is sought, the previous physical condition of the workman is immaterial and recovery may be had for the full disability independent of any preexisting or congenital weakness . . .

See also Dennis v. Dep't of Labor & Indus., 109 Wn.2d 467, 474, 745 P.2d 1295 (1987); Jacobson v. Dep't of Labor & Indus., 37 Wn.2d 444, 448, 224 P.2d 338 (1950); Simpson Timber Co. v. Wentworth, 96 Wn.App. 731, 739, 981 P.2d 878 (1999); McDonagh v. Dep't of Labor & Indus., 68 Wn.App. 749, 845 P.2d 1030 (1993); Wendt v. Dep't of Labor & Indus., 18 Wn.App. 674, 571 P.2d 229 (1977).

A pre-existing condition may "naturally progress" on its own thus bringing about a disability or death not covered by workers' compensation benefits. In a case in which there is medical testimony that an industrial injury or occupational disease proximately caused this otherwise natural progression to accelerate, additional instruction to the jury on this point is recommended. Cases mentioning such "acceleration" are Mork v. Dep't of Labor & Indus., 48 Wn.2d 74, 76–77 (1956); Harbor Plywood v. Dep't of Labor & Indus., 48 Wn.2d 553, 556, 295 P.2d 310 (1956); Barkhurst v. Dep't of Labor & Indus., 150 Wash. 551, 272 P.105 (1935); Shadbolt v. Dep't of Labor & Indus., 121 Wash. 409, 412, 209 P.683 (1922).

[Current as of November 2016.]

WPI 155.21

WORSENING OF PRE-EXISTING, SYMPTOMATIC CONDITION

If you find that:

(1) at the time of the [industrial injury] [occupational disease], (worker's name) **had a [bodily] [mental] condition that was symptomatic or disabling; and**

(2) because of the [industrial injury] [occupational disease] the pre-existing condition was made worse;

then (worker's name) **is eligible for benefits for [his] [her] [full disability] [need for treatment] even though** (worker's name)'s **[disability] [need for treatment] may be greater than it would have been for a person in the same circumstances without that pre-existing condition.**

[A worker may not be eligible for benefits, however, for any treatment or disabilities that resulted from the natural progression of the pre-existing condition independent of this [industrial injury] [occupational disease].]

NOTE ON USE

Use bracketed material as applicable.

Use this instruction for a pre-existing condition that was symptomatic or disabling at the time of the event on which the claim is based. When the evidence is disputed as to the existence of such pre-existing pain or disability, use both this instruction and use WPI 155.20 (Lighting Up of Pre-Existing, Asymptomatic Condition).

COMMENT

This instruction was first published in the 2017–2018 Supplement to 6 Washington Practice, Washington Pattern Jury Instructions: Civil (6th ed.).

For a related discussion, see the Comment to WPI 155.20 (Lighting

Up of Pre-Existing, Asymptomatic Condition). The cases cited there are equally applicable here.

Note that a pre-existing permanent partial disability may be offset, by statute, from any increase in permanent partial disability proximately caused by a work injury or exposure. RCW 51.32.080(5); Beyer v. Dep't of Labor & Indus., 17 Wn.2d 29, 134 P.2d 948 (1943); Tomlinson v. Puget Sound Freight Lines, Inc., 140 Wn.App. 845, 166 P.3d 1276 (2007).

[Current as of November 2016.]

WPI 155.25

INJURY TO PARTICULAR WORKER

The Industrial Insurance Act applies to all persons covered by its provisions regardless of their age or the previous condition of their health.

In determining the effect of an occurrence upon a worker, such effect must always be determined with reference to the particular worker involved, rather than on the effect, if any, it would have had upon some other person.

NOTE ON USE

This instruction will commonly be given to the jury regarding the significance of a worker's age, health, or the presence of a medical or psychological susceptibility or condition. This instruction is intended to be used in conjunction with the appropriate proximate cause instruction pertinent to the case. See WPI 155.06 (Proximate Cause—Allowed Claim) et seq.

COMMENT

This instruction was first published in the 2017–2018 Supplement to 6 Washington Practice, Washington Pattern Jury Instructions: Civil (6th ed.).

This instruction advises jurors to focus on the particular claimant with all of his or her individual attributes, including any susceptibility to the type of disability that may be at issue. It is related to, but different from, the two instructions that deal with the lighting up or the exacerbation of a pre-existing condition, WPI 155.20 and WPI 155.21. Each of these related principles is embodied in the fundamental notion that the Industrial Insurance Act takes the worker as one finds him or her, and bears responsibility for the manner and degree in which any industrial injury or occupational disease manifests itself on that individual. It is not uncommon that the circumstances of the case call for instructions on both principles.

Among the cases most often cited for these propositions are Groff v. Dep't of Labor & Indus., 65 Wn.2d 35, 44, 395 P.2d 633 (1964) ("industry takes the workman as he is"); Kallos v. Dep't of Labor & Indus., 46 Wn.2d 26, 278 P.2d 393 (1955) ("benefits are not limited to those in perfect health"), and Miller v. Dep't of Labor & Indus., 200 Wash. 674, 94 P.2d 764 (1939).

In *Miller,* the court had before it a longshoreman claimant with a permanent partial disability resulting from a serious back injury coupled with a previously unknown congenital weakness of the back. The court first discussed the established principle that when an industrial injury lights up a "weakened physical condition occasioned by disease," the resultant disability is to be "attributed to the injury, and not to the preexisting physical condition." Miller v. Dep't of Labor & Indus., 200 Wash at 682. The court then observed:

> If this be true with respect to a weakened physical condition resulting from disease, it must likewise be true with respect to a similar infirmity resulting from some structural weakness of the body. As we have many times stated, the provisions of the workmen's compensation act are not limited in their benefits to such persons only as approximate physical perfection, for few, if any, workmen are completely free from latent infirmities originating either in disease or in some congenital abnormality. It is a fundamental principle which most, if not all, courts accept, that if the accident or injury complained of is the proximate cause of the disability for which compensation is sought, the previous physical condition of the workman is immaterial and recovery may be had for the full disability independent of any preexisting or congenital weakness; the theory upon which that principle is founded is that the workman's prior physical condition is not deemed the cause of the injury, but merely a condition upon which the real cause operated.

Miller v. Dep't of Labor & Indus., 200 Wash 674, 682–83, 94 P.2d 764 (1939).

[Current as of November 2016.]

WPI 155.30

OCCUPATIONAL DISEASE—DEFINITION

An occupational disease is a disease or infection that arises naturally and proximately out of the worker's employment.

A disease arises naturally out of employment if the disease comes about as a matter of course as a natural consequence of distinctive conditions of the worker's employment. It is not necessary that the conditions be peculiar to, or unique to, the particular employment. A disease does not arise naturally out of employment if it is caused by conditions of everyday life or of all employments in general.

A disease arises proximately out of employment if the conditions of the worker's employment proximately caused or aggravated the worker's disease [including aggravation of a pre-existing non-work-related disease].

NOTE ON USE

Use bracketed material as applicable.

COMMENT

RCW 51.08.140. This instruction was first published in the 2017–2018 Supplement to 6 Washington Practice, Washington Pattern Jury Instructions: Civil (6th ed.).

This instruction is drawn from the above-cited statute defining the term "occupational disease" and Dennis v. Dep't of Labor & Indus., 109 Wn.2d. 467, 745 P.2d 1295 (1987), which interpreted the statute.

[Current as of November 2016.]

WPI 155.31

TREATMENT—DEFINITION

A worker who [sustains an industrial injury] [has an occupational disease] is entitled to receive proper and necessary health care services for the diagnosis and treatment of any condition proximately caused by the [injury] [occupational disease]. Proper and necessary services may be either curative or rehabilitative.

Curative treatment is treatment intended to produce permanent changes which eliminate or lessen the clinical effects of the condition. Rehabilitative treatment is treatment intended to allow an injured or ill worker to regain functional activity on a long-term basis.

[A worker is entitled to proper and necessary health care services until the condition reaches [and maintains] a state of maximum medical improvement.] Maximum medical improvement occurs when no fundamental or marked change in the condition can be expected, with or without treatment. [The term "maximum medical improvement" is equivalent to "fixed and stable."]]

NOTE ON USE

Use this instruction when there are issues of the scope of allowable treatment.

Use bracketed language as appropriate.

COMMENT

This instruction was first published in the 2017–2018 Supplement to 6 Washington Practice, Washington Pattern Jury Instructions: Civil (6th ed.).

For the most part, the language in this instruction is taken directly from RCW 51.36.010 and WAC 296-20-01002. Although these sources have not been quoted in their entirety, it is the intent of the WPI Committee to convey their central propositions that will most often be

necessary. It is anticipated that, depending on the facts and issues in a particular case, additional language from these sources may need to be added as well as language from case law interpreting them. Some additional clarification may also be seen as helpful.

While RCW 51.36.010 uses the term "proper and necessary medical and surgical services," WAC 296-20-01002 uses the term "proper and necessary health care services." The WPI Committee has used the latter term in the belief that this is consistent with the law. No substantive change from the statute is intended.

In distinguishing curative and rehabilitative treatment from merely palliative treatment, WAC 296-20-01002 states "[c]urative and rehabilitative care produce long-term changes." The WPI Committee has modified this language to clarify that it is the intention to produce such changes rather than their actual production that is in issue.

To the extent that application of such terms as "clinical effects" and "functional activity" are in issue, the court and counsel should work to draft helpful clarifying instructions.

In a case involving issues of whether or not the claimant has reached a state of maximum medical improvement, it may be necessary to provide the jury with further definition. Reference should be made to the WAC definition of the term.

> Maximum medical improvement occurs when no fundamental or marked change in the accepted condition can be expected, with or without treatment. Maximum medical improvement may be present though there may be fluctuations in levels of pain and function. A worker's condition may have reached maximum medical improvement though it might be expected to improve or deteriorate with the passage of time. Once a worker's condition has reached maximum medical improvement, treatment that results only in temporary or transient changes is not proper and necessary.

WAC 296-20-01002.

The term "maximum medical improvement" is the equivalent of the formerly-used term "fixed and stable." WAC 296-20-01002. If, as often still happens, medical testimony has used the term "fixed and stable," it may be helpful to include the language explaining the equivalence of the old and new terms. Both terms anticipate the possibility of some fluctuation in a worker's condition. As the Court of Appeals has observed:

> Thus, the term "fixed" does not mean "static." It is clear that where a claimant's condition is deteriorating or further medical treatment

is contemplated, the condition is not "fixed" and the claim remains open so that treatment can be provided. However, if a claimant's condition has stabilized to the point where no further medical treatment is required, the condition is "fixed" for purposes of closing the claim and determining the disability award.

Pybus Steel Company v. Dep't of Labor & Indus., 12 Wn.App. 436, 439, 530 P.2d 350 (1975).

Per WAC 296-20-03002(4), appropriate treatment does not include "[c]ontinued treatment beyond stabilization of the industrial condition(s), i.e., maintenance care . . . ." The WPI Committee is not recommending use of this language in the pattern instruction for two reasons. First, it is generally an unnecessary negative statement following the positive statement as to what is includable. Second, it could lead to jury confusion as to a distinction between "rehabilitative care" (authorized) and "maintenance care" (not authorized). Review of Board decisions suggests that certain cases could call for the drafting of further clarifying instructions to assist the jury when this distinction is in issue.

[Current as of November 2016.]

PART XII

FRAUD

CHAPTER 160 FRAUD

CHAPTER 165 NEGLIGENT MISREPRESENTATION

CHAPTER 160

FRAUD

WPI 160.01 Elements of Fraud
WPI 160.02 Fraud—Burden of Proof
WPI 160.03 Fraud—Burden of Proof—Combined With Preponderance of Evidence
WPI 160.04 Fraud—Burden of Proof on the Issues

WPI 160.01

ELEMENTS OF FRAUD

There are nine elements of fraud. They are:

(1) Representation of an existing fact;

(2) Materiality of the representation;

(3) Falsity of the representation;

(4) The speaker's knowledge of its falsity;

(5) The speaker's intent that it be acted upon by the plaintiff;

(6) Plaintiff's ignorance of the falsity;

(7) Plaintiff's reliance on the truth of the representation;

(8) Plaintiff's right to rely upon it; and

(9) Resulting damage.

NOTE ON USE

Use either WPI 160.02 (Fraud—Burden of Proof) or WPI 160.03 (Fraud—Burden of Proof—Combined with Preponderance of Evidence) on the burden of proof with this instruction. Replace "plaintiff" with the name of the person to whom the representation is made, as appropriate.

This instruction may not be needed if the jury is being instructed with WPI 160.04 (Fraud—Burden of Proof on the Issues).

COMMENT

The instruction was revised in 2010, primarily to remove the reference to "clear, cogent, and convincing evidence." This reference unnecessarily duplicates what is included in the separate burden of proof instructions, WPI 160.02 (Fraud—Burden of Proof) and WPI 160.03 (Fraud—Burden of Proof—Combined with Preponderance of Evidence).

The nine elements are set forth in Stiley v. Block, 130 Wn.2d 486, 505, 925 P.2d 194 (1996), and Hoffer v. State, 110 Wn.2d 415, 425, 755 P.2d 781 (1988), affirmed on rehearing, 113 Wn.2d 148, 153, 776 P.2d 963 (1989), and the cases cited therein. If the fraud involves the transfer of property with intent to hinder a creditor or for insufficient value, see the Uniform Voidable Transactions Act, RCW Chapter 19.40, for statutory remedies.

With regard to drafting a burden of proof instruction for fraud claims, see WPI 160.02 (Fraud—Burden of Proof) and WPI 160.03 (Fraud—Burden of Proof—Combined With Preponderance of the Evidence).

[Current as of September 2018.]

WPI 160.02

FRAUD—BURDEN OF PROOF

A party who alleges [fraud] [_____] has the burden of proving each of the elements of [fraud] [_____] by clear, cogent, and convincing evidence.

Proof by clear, cogent, and convincing evidence means that the element must be proved by evidence that carries greater weight and is more convincing than a preponderance of evidence. Clear, cogent, and convincing evidence exists when occurrence of the element has been shown by the evidence to be highly probable. However, it does not mean that the element must be proved by evidence that is convincing beyond a reasonable doubt.

A "preponderance of the evidence" means that you must be persuaded, considering all the evidence in the case, that a proposition is more probably true than not true. "Preponderance of the evidence" is defined here solely to aid you in understanding the meaning of "clear, cogent, and convincing."

NOTE ON USE

Use this instruction when the jury has not been given WPI 21.01 (Meaning of Burden of Proof—Preponderance of the Evidence). If there is an alternative claim involving preponderance of the evidence so that WPI 21.01 (Meaning of Burden of Proof—Preponderance of the Evidence) is also given, use WPI 160.03 (Fraud—Burden of Proof—Combined with Preponderance of Evidence), instead of this instruction.

This instruction is not limited to fraud cases. By changing the word "fraud," it may be used in any case in which the burden of proof is "clear, cogent, and convincing evidence."

For a discussion of the high probability standard, see the Comment.

COMMENT

Fraud must be proved by clear, cogent, and convincing evidence. See Stiley v. Block, 130 Wn.2d 486, 505, 925 P.2d 194 (1996); DeWolf &

Allen, 16A Washington Practice, Tort Law & Practice § 19:2 (4th ed.). For a listing of "facts" other than fraud requiring proof by clear, cogent, and convincing evidence, see Tegland, 5 Washington Practice, Evidence § 301.3 (6th ed.).

"Clear, cogent, and convincing evidence" denotes a quantum of evidence or degree of proof greater than a mere preponderance, but something less than proof beyond a reasonable doubt. In re Deming, 108 Wn.2d 82, 109, 736 P.2d 639 (1987); Davis v. Department of Labor and Industries, 94 Wn.2d 119, 126, 615 P.2d 1279 (1980); Bland v. Mentor, 63 Wn.2d 150, 154, 385 P.2d 727 (1963).

In Holmes v. Raffo, 60 Wn.2d 421, 426, 374 P.2d 536 (1962), the court held that the failure to advise the jury that "clear, cogent, and convincing" proof is a higher degree of proof than a "preponderance of evidence" constitutes reversible error.

In 2010, the WPI Committee added a sentence clarifying for jurors that "clear, cogent, and convincing" proof means proof that an occurrence is "highly probable." The high probability standard is now well established as a means for defining clear, cogent, and convincing evidence. See, e.g., Dalton v. State, 130 Wn.App. 653, 666, 124 P.3d 305 (2005); State Farm Fire & Cas. Co. v. Huynh, 92 Wn.App. 454, 465–66, 962 P.2d 854 (1998); see generally DeWolf & Allen, 16A Washington Practice, Tort Law & Practice § 19.2 (4th ed.); Tegland, 5 Washington Practice, Evidence Law and Practice § 301.3 (6th ed.). Juror understanding should be improved by adding the more direct definition, supplementing the statement that the standard falls somewhere between a mere preponderance and beyond a reasonable doubt.

If an instruction defining "preponderance of evidence" has been given, use of this instruction would give the jury two conflicting tests for burden of proof. Accordingly, WPI 160.03 (Fraud—Burden of Proof—Combined with Preponderance of Evidence), must be given, instead of this instruction, to avoid error. Adjustment Dep't, Olympia Credit Bureau, Inc. v. Smedegard, 40 Wn.2d 76, 78, 241 P.2d 203 (1952).

[Current as of September 2018.]

WPI 160.03

FRAUD—BURDEN OF PROOF—COMBINED WITH PREPONDERANCE OF EVIDENCE

A party who alleges [fraud] [_____] has the burden of proving each of the elements of [fraud] [_____] by clear, cogent, and convincing evidence. However, this burden of proof is applicable only to the proof of [fraud] [_____]. All other allegations of [plaintiff] [defendant] [the respective parties] must be proved by a preponderance of the evidence as that term is more fully defined in other instructions.

Proof by clear, cogent, and convincing evidence means that the element must be proved by evidence that carries greater weight and is more convincing than a preponderance of evidence. Clear, cogent, and convincing evidence exists when occurrence of the element has been shown by the evidence to be highly probable. However, it does not mean that the element must be proved by evidence that is convincing beyond a reasonable doubt.

NOTE ON USE

Use bracketed material as applicable.

Use WPI 21.01 (Meaning of Burden of Proof—Preponderance of the Evidence) and this instruction in any case in which it is necessary to instruct on "preponderance of the evidence" as well as on the burden of proof involved in an allegation of fraud. However, the use of this instruction is not limited to cases involving fraud. By changing the word "fraud," it may be used in any appropriate case in which the burden of proof of "clear, cogent, and convincing evidence" is used along with "preponderance of the evidence."

COMMENT

If the court also has instructed the jury on "preponderance of the evidence" (WPI 21.01 (Meaning of Burden of Proof—Preponderance of the Evidence)), a general instruction on the burden of proof in fraud cases (WPI 160.02 (Fraud—Burden of Proof)), would give the jury two tests for burden of proof that appear to be in conflict. This must be

clarified for the jury if error is to be avoided. Adjustment Dep't, Olympia Credit Bureau, Inc. v. Smedegard, 40 Wn.2d 76, 78, 241 P.2d 203 (1952). This instruction is designed to resolve this issue.

For a discussion of clear, cogent, and convincing evidence, and for changes made to this instruction in clarifying the definition, see the Comment accompanying WPI 160.02 (Fraud—Burden of Proof).

[Current as of September 2018.]

WPI 160.04

FRAUD—BURDEN OF PROOF ON THE ISSUES

(Name of fraud claimant(s)) **[has] [have] the burden of proving by clear, cogent, and convincing evidence each of the following elements on [his] [her] [their] [its] claim of fraud:**

(1) that (name of fraud defendant) **made a representation of existing fact;**

(2) that the fact represented was material;

(3) that the representation was false;

(4) that (name of fraud defendant) **knew the representation was false;**

(5) that (name of fraud claimant(s)) **did not know that the representation was false;**

(6) that (name of fraud defendant) **intended that** (name of fraud claimant(s)) **would act upon the representation;**

(7) that (name of fraud claimant(s)) **had a right to rely on the truth of the representation;**

(8) that (name of fraud claimant(s)) **did rely on the truth of the representation; and**

(9) that (name of fraud claimant(s)) **[was] [were] damaged by reliance on the representation.**

If you find from your consideration of all the evidence that each of these elements has been proved, your verdict should be for (name of fraud claimant(s)) **on this claim. On the other hand, if any of these elements has not been proved, your verdict should be for** (name of fraud defendant) **on this claim.**

NOTE ON USE

With this instruction, use one of the instructions on the applicable

burden of proof, WPI 160.02 (Fraud—Burden of Proof) or WPI 160.03 (Fraud—Burden of Proof—Combined with Preponderance of Evidence).

COMMENT

The instruction is similar to WPI 160.01 (Elements of Fraud), but presents the information in a different format.

For a discussion of related issues, see the Comment to WPI 160.01 (Elements of Fraud).

[Current as of September 2018.]

CHAPTER 165

NEGLIGENT MISREPRESENTATION

WPI 165.00	Negligent Misrepresentation—Introduction
WPI 165.01	Negligent Misrepresentation—Affirmative Misstatement—Burden of Proof on the Issues
WPI 165.02	Negligent Misrepresentation—Failure to Disclose Information—Burden of Proof on the Issues
WPI 165.03	Negligent Misrepresentation—Failure to Disclose Information—Duty to Disclose
WPI 165.03.01	Duty to Disclose—Mixed Issues of Fact and Law
WPI 165.03.02	Duty to Disclose—Mixed Issues of Fact and Law—Special Verdict Form
WPI 165.04	Negligent Misrepresentation—Failure to Disclose Information—Fiduciary Relationship—Relationship of Trust and Confidence—Definitions
WPI 165.05	Negligent Misrepresentation—Clear, Cogent, and Convincing Evidence
WPI 165.06	Negligent Misrepresentation—Clear, Cogent, and Convincing Evidence—Combined With Preponderance of Evidence

WPI 165.00

NEGLIGENT MISREPRESENTATION—INTRODUCTION

Scope of chapter—Business transactions and pecuniary interest. Washington courts have adopted standards for negligent misrepresentation as set forth in sections 551 and 552 of the Restatement (Second) of Torts (1977). Under those sections, liability for negligent misrepresentation is limited to misrepresentations made in the course of a business transaction or a transaction in which the maker of the misrepresentation has a pecuniary interest. See, e.g., Restatement (Second) of Torts § 552(1) (1977).

In limited circumstances, a person may be liable for negligent misrepresentation when it occurs outside a business transaction or the person lacks a pecuniary interest. The Restatement (Second) notes that liability for a negligent misrepresentation can also exist when the misrepresentation results in physical harm. See Restatement (Second) of

Torts § 552, comment a (1977). The Restatement (Second) sets forth standards of liability for cases involving physical harm, see Restatement (Second) of Torts § 311 (1965), but Washington courts have not yet adopted this Restatement section. See Richland Sch. Dist. v. Mabton Sch. Dist., 111 Wn.App. 377, 388–89, 45 P.3d 580 (2002) (declining to adopt section 311 under the facts of the case and noting that Washington courts have not otherwise addressed the issue); see also Isakson v. WSI Corp., 771 F.Supp.2d 1257, 1264 (W.D. Wash. 2011).

Pending further development of standards for liability in other contexts, the instructions in this chapter are limited to those involving business transactions or pecuniary interests.

Two types of negligent misrepresentation. A negligent misrepresentation can be based on either an affirmative misstatement or a failure to disclose information. It is important to distinguish between the two types of cases, as different standards of liability apply. Compare Restatement (Second) of Torts § 552 (addressing affirmative misstatements), with Restatement (Second) of Torts § 551 (1977) (addressing failures to disclose information). The standards for a failure to disclose information require additional proof, including proof that the defendant owed a special duty to disclose the information to the plaintiff.

For cases involving an affirmative misstatement, the primary instruction is WPI 165.01 (Negligent Misrepresentation—Affirmative Misstatement—Burden of Proof on the Issues). For cases involving a failure to disclose information, the primary instruction is WPI 165.02 (Negligent Misrepresentation—Failure To Disclose Information—Burden of Proof On The Issues), but two additional instructions likely will be needed: WPI 165.03 (Negligent Misrepresentation—Failure To Disclose Information—Duty To Disclose); and WPI 165.04 (Negligent Misrepresentation—Failure To Disclose Information—Fiduciary Relationship—Relationship of Trust And Confidence—Definitions).

Common law, statutory, and contractual duties to disclose information. The Restatement (Second)'s standards are phrased primarily in terms of common law duties to disclose information. See e.g. Restatement (Second) of Torts § 551(2) (1977) (setting forth circumstances under which a party has a duty to disclose information). The pattern instructions in this chapter follow the Restatement (Second)'s approach in expressing the common law duties to disclose.

Sometimes, however, a duty to disclose information is created by contract or statute. For example, a seller of real estate is statutorily required to disclose certain information about the property being sold. See RCW 64.06.013 to .022. A statutory or contractual duty may sometimes be used as the basis for a negligent misrepresentation claim. The pattern instructions can be easily modified to incorporate one of these other duties.

Comparative fault. Negligent misrepresentation claims are subject to principles of comparative fault. Lawyers Title Ins. Corp. v. Baik, 147 Wn.2d 536, 550–54, 55 P.3d 619 (2002); ESCA Corp. v. KPMG Peat Marwick, 135 Wn.2d 820, 829–32, 959 P.2d 651 (1998). Under comparative fault, a plaintiff's own negligence in contributing to his or her own damages serves to reduce the plaintiff's recovery, rather than to bar recovery entirely. Lawyers Title Ins. Corp. v. Baik, 147 Wn.2d at 551. Washington courts have thus rejected the Restatement (Second)'s position that a plaintiff's negligence in relying on the negligent misrepresentation is a complete bar to recovery. Lawyers Title Ins. Corp. v. Baik, 147 Wn.2d at 550–51.

The principles of comparative fault do not apply until after the plaintiff has established the elements of the claim. One of the elements requires the plaintiff to prove that his or her reliance on the misrepresentation was reasonable under the circumstances. If the plaintiff was negligent in a manner that rendered the reliance unreasonable, then the plaintiff is barred from recovery, not because of the application of comparative fault, but because the plaintiff has failed to prove the elements of the claim. *Baik* recognizes as much, indicating that a plaintiff must first show reasonable reliance and proximately caused damages before comparative fault comes into play. See Lawyers Title Ins. Corp. v. Baik, 147 Wn.2d at 551:

> [W]here a plaintiff reasonably reposes some trust in a misrepresentation and shows that that reliance proximately caused some damages, the automatic preclusion of a negligent misrepresentation claim on the grounds that the plaintiff could have done something more would be the sort of 'harsh result' that the comparative fault statute sought to forestall in tort claims.

Independent duty doctrine. The independent duty doctrine must be considered when a party to a contract brings a tort action against another contractual party. Under the doctrine, " '[a]n injury . . . is remediable in tort if it traces back to the breach of a tort duty arising independent of the terms of the contract.' " Elcon Const., Inc. v. E. Wash. Univ., 174 Wn.2d 157, 165, 273 P.3d 965 (2012) (quoting Eastwood v. Horse Harbor Found., Inc., 170 Wn.2d 380, 416, 241 P.3d 1256 (2010)). However, if the tort duty is interrelated with the contractual obligation, then the parties are limited to contractual remedies. The independent duty doctrine is applied to a narrow range of cases, especially those involving product liability, construction on real property, or sale of real estate. Elcon Const., Inc. v. E. Wash. Univ., 174 Wn.2d at 165; Eastwood v. Horse Harbor Found., Inc., 170 Wn.2d at 406–07 (Chambers, J., concurring).

The independent duty doctrine was previously known as the "eco-

nomic loss rule." Elcon Const., Inc. v. E. Wash. Univ., 174 Wn.2d at 165. The old economic loss rule "bar[red] recovery for alleged breach of tort duties where a contractual relationship exist[ed] and the losses [were] economic losses." Alejandre v. Bull, 159 Wn.2d 674, 683, 153 P.3d 864 (2007). By comparison, the independent duty doctrine makes no inquiry as to whether losses were economic in nature, focusing instead on whether there is a tort duty that is independent of the parties' contractual obligations, an inquiry that involves a case-by-case analysis of considerations of "common sense, justice, policy, and precedent." Elcon Const., Inc. v. E. Wash. Univ., 174 Wn.2d at 165; Eastwood v. Horse Harbor Found., Inc., 170 Wn.2d at 389. Thus, cases decided under the older rule may no longer be good law.

For example, the former economic loss rule was applied to bar a negligent misrepresentation claim asserted between parties to the sale of real property. See Alejandre v. Bull, 159 Wn.2d at 681–89. Whether the new independent duty doctrine applies to negligent misrepresentation claims is not clear. The only indication to date is dictum from Jackowski v. Borchelt, 174 Wn.2d 720, 738, 278 P.3d 1100 (2012). After holding that the duty to avoid *fraudulent* misrepresentation is independent of the contract, and thus the tort can be maintained between contractual parties, the *Jackowski* court went on to conclude: "The same is true for a claim of negligent misrepresentation, but only to the extent the duty to not commit negligent misrepresentation is independent of the contract." Jackowski v. Borchelt, 174 Wn.2d at 738.

The scope, rationale, and analysis of the independent duty doctrine remain in a state of flux. Compare the plurality and concurring opinions in *Eastwood* (a plurality opinion was signed by four justices, with two separate concurring opinions) and the majority and concurring opinion in *Elcon* (the concurring opinion disagreed with the majority opinion as to the fundamental underpinnings of the independent duty doctrine and its relationship to the economic loss rule). Practitioners will need to review the current state of the case law in determining the application of the independent duty doctrine to claims of negligent misrepresentation.

[Current as of September 2018.]

WPI 165.01

NEGLIGENT MISREPRESENTATION—AFFIRMATIVE MISSTATEMENT—BURDEN OF PROOF ON THE ISSUES

(Name of plaintiff) **has the burden of proving by clear, cogent, and convincing evidence each of the following elements for the claim of negligent misrepresentation:**

(1) that (name of defendant) **supplied information for the guidance of others in their business transactions that was false;**

(2) that (name of defendant) **knew or should have known that the information was supplied to guide** (name of plaintiff) **in business transactions;**

(3) that (name of defendant) **was negligent in obtaining or communicating the false information;**

(4) that (name of plaintiff) **relied on the false information;**

(5) that (name of plaintiff)'s **reliance on the false information was reasonable; and**

(6) that the false information proximately caused damages to (name of plaintiff).

If you find from your consideration of all the evidence that each of these elements has been proved, your verdict should be for (name of plaintiff) **on this claim. On the other hand, if any of these elements has not been proved, your verdict should be for** (name of defendant) **on this claim.**

NOTE ON USE

The instruction sets forth the elements of a claim for negligent misrepresentation. This instruction is to be used for claims that are based on an affirmative statement rather than on a failure to disclose information. For claims based on a failure to disclose information, use

WPI 165.02 (Negligent Misrepresentation—Failure to Disclose Information—Burden of Proof on the Issues) instead of this instruction.

With this instruction use WPI 10.01 (Negligence—Adult—Definition), the applicable proximate cause instruction from WPI Chapter 15, and one of the two instructions that set forth the clear, cogent, and convincing standard of proof: WPI 165.05 (Negligent Misrepresentation—Clear, Cogent, And Convincing Evidence) or WPI 165.06 (Negligent Misrepresentation—Clear, Cogent, And Convincing Evidence—Combined With Preponderance of Evidence).

This instruction may need to be modified depending on the facts and issues in a particular trial. For example, the parties may dispute whether the defendant made the statement in question in the course of business, profession, or employment, or whether the alleged statement was in fact made, or whether it was false, or the like.

COMMENT

Source of instruction. Washington courts have adopted the standards for negligent misrepresentation from Section 552 of the Restatement (Second) of Torts (1977). ESCA Corp. v. KPMG Peat Marwick, 135 Wn.2d 820, 826, 959 P.2d 651 (1998); Dewar v. Smith, 185 Wn. App. 544, 342 P.3d 328, review denied 183 Wn.2d 1024 (2015) (trial court erroneously imposed summary judgment when proximate cause element was disputed); Guarino v. Interactive Objects, Inc., 122 Wn.App. 95, 129–30, 86 P.3d 1175 (2004). Section 552(1) reads as follows:

> One who, in the course of his business, profession or employment, or in any other transaction in which he has a pecuniary interest, supplies false information for the guidance of others in their business transactions, is subject to liability for pecuniary loss caused to them by their justifiable reliance upon the information, if he fails to exercise reasonable care or competence in obtaining or communicating the information.

From these standards, Washington courts have developed the following elements for the cause of action:

(1) the defendant supplied information for the guidance of others in their business transactions that was false,

(2) the defendant knew or should have known that the information was supplied to guide the plaintiff in his business transactions,

(3) the defendant was negligent in obtaining or communicating the false information,

(4) the plaintiff relied on the false information,

(5) the plaintiff's reliance was reasonable, and

(6) the false information proximately caused the plaintiff damages.

Ross v. Kirner, 162 Wn.2d 493, 499, 172 P.3d 701 (2007); Austin v. Ettl, 171 Wn.App. 82, 286 P.3d 85 (2012); see also Lawyers Title Ins. Corp. v. Baik, 147 Wn.2d 536, 545, 55 P.3d 619 (2002); and ESCA Corp. v. KPMG Peat Marwick, 135 Wn.2d 820, 827–28, 959 P.2d 651 (1998).

Reliance. Washington cases vary in their description of the requirement as to the plaintiff's reliance. In *Ross*, the court required that a plaintiff's reliance be "reasonable." Ross v. Kirner, 162 Wn.2d at 499. Other opinions require that the reliance be "justifiable," which is the term used in Restatement (Second) section 552. See, e.g., ESCA Corp. v. KPMG Peat Marwick, 135 Wn.2d at 826–31; Van Dinter v. Orr, 157 Wn.2d 329, 332–33, 138 P.3d 608 (2006). Washington cases appear to use the terms "reasonable" and "justifiable" interchangeably. See, e.g., Lawyers Title Ins. Corp. v. Baik, 147 Wn.2d at 551 (defining "justifiable reliance" in this context as meaning "reliance [that] [is] reasonable under the surrounding circumstances"); ESCA Corp. v. KPMG Peat Marwick, 135 Wn.2d at 828 (same holding as in *Baik*). The WPI Committee has used the word "reasonable" to convey these concepts, as it is the easiest for jurors to understand.

Issues of comparative fault can arise if the plaintiff's reliance was negligent. For a discussion of comparative fault, see WPI 165.00 (Negligent Misrepresentation—Introduction).

Business transactions. Liability for negligent misrepresentation under Section 552 exists only when the defendant was acting in the course of a business transaction or otherwise had a pecuniary interest in the transaction. See Restatement (Second) of Torts, § 552(1), and comments c, d (1977). For further discussion, see WPI 165.00 (Negligent Misrepresentation—Introduction).

Duty to third parties. Under Section 552 of the Restatement, a defendant may owe a duty of care to avoid misstatements not only to the person who directly receives the defendant's statements, but also to certain third parties if the defendant knows or should know that the third party will rely upon the information. Restatement (Second) of Torts § 552 (1977). For example, in Schaaf v. Highfield, 127 Wn.2d 17, 21–27, 896 P.2d 665 (1995), the court held that a real property appraiser owed a duty of care to a prospective house buyer, even though the appraiser was hired by the lender and was not in privity with the buyer. Nonetheless, "only those in a limited class" are owed a duty of

care, and whether or not the plaintiff qualifies is a question of law. Schaaf v. Highfield, 127 Wn.2d at 21–22, 26.

[Current as of September 2018.]

WPI 165.02

NEGLIGENT MISREPRESENTATION—FAILURE TO DISCLOSE INFORMATION—BURDEN OF PROOF ON THE ISSUES

(Name of plaintiff) has the burden of proving by clear, cogent, and convincing evidence each of the following elements for the claim of negligent misrepresentation:

(1) that the defendant had a duty to disclose to (name of plaintiff) the following information: (describe the information at issue);

(2) that (name of defendant) did not disclose this information to (name of plaintiff);

(3) that (name of defendant) was negligent in failing to disclose this information;

[(4) that the disclosure of this information would have caused (name of plaintiff) to act differently;] and

[(4)] [(5)] that (name of plaintiff) was damaged by the failure to disclose this information.

NOTE ON USE

The instruction sets forth the elements for a claim of negligent misrepresentation that is based on a failure to disclose information. For cases involving a claim of negligent misrepresentation that is based on affirmative misstatements, use WPI 165.01 (Negligent Misrepresentation—Affirmative Misstatement—Burden of Proof on the Issues) instead of this instruction.

The determination of whether or not a duty was owed to the plaintiff is ordinarily a question of law for the court. If the duty arises from contract or statute, element (1) should be modified to specify the duty that the defendant owed to the plaintiff. In cases where the facts allegedly giving rise to the duty of care are disputed, use WPI 165.03 (Negligent Misrepresentation—Failure to Disclose Information—Duty to Disclose).

Element (4) is set forth in brackets. It should be used in cases

involving a factual dispute as to whether the defendant's nondisclosure was material to the plaintiff's decision to complete the transaction. For example, in a guaranty case a jury might find that, even if the relevant information had been disclosed, the plaintiff would have entered into the guaranty relationship anyway. On the other hand, a jury might find that that if the plaintiff had been made aware of the undisclosed information she would not have become a guarantor. In such cases the element is appropriately included. By contrast, in cases where the primary effect of the disclosure of the information would have been to affect the terms of the transaction, such as the price, the causation element is sufficiently expressed in the damages instruction and element (4) may be omitted.

This instruction should be accompanied by WPI 10.01 (Negligence—Adult—Definition), the applicable proximate cause instruction from WPI Chapter 15, and one of the two instructions that address the clear, cogent, and convincing standard of proof: WPI 165.05 (Negligent Misrepresentation—Clear, Cogent, And Convincing Evidence) or WPI 165.06 (Negligent Misrepresentation—Clear, Cogent, And Convincing Evidence—Combined With Preponderance of Evidence).

See discussion in the Comment below.

COMMENT

Duty. The question of whether a defendant owed the plaintiff a duty of care is frequently referred to as a question of law for the court. See the Comment to WPI 165.03 (Negligent Misrepresentation—Failure To Disclose Information—Duty To Disclose).

The instruction is based on the standards from Section 551(1) of the Restatement (Second) of Torts (1977), which has been adopted as Washington law. See Colonial Imports, Inc. v. Carlton N.W., Inc., 121 Wn.2d 726, 731, 853 P.2d 913 (1993); Guarino v. Interactive Objects, Inc., 122 Wn.App. 95, 129–30, 86 P.3d 1175 (2004). The Restatement (Second)'s Section 551(1) reads:

> One who fails to disclose to another a fact that he knows may justifiably induce the other to act or refrain from acting in a business transaction is subject to the same liability to the other as though he had represented the nonexistence of the matter that he has failed to disclose, if, but only if, he is under a duty to the other to exercise reasonable care to disclose the matter in question.

Under Section 551(1), liability extends only to circumstances when the defendant had a duty to exercise reasonable care in disclosing the information. The circumstances under which this duty arises are addressed in the second paragraph of Section 551 and in WPI 165.03

(Negligent Misrepresentation—Failure to Disclose Information—Duty to Disclose).

As indicated in WPI 165.00 (Negligent Misrepresentation—Introduction), the pattern instruction follows the approach of the Restatement (Second)'s Section 551 in setting forth duties to disclose that are based on the common law. A duty to disclose information may also be imposed by contract or statute. For such cases, the instruction above may be modified. Some statutory duties may be created as part of a scheme that includes special statutory remedies; for such duties, a determination may need to be made whether the special remedy was intended to preempt other remedies, such as a negligent misrepresentation claim.

Reliance/Causation. In cases involving an affirmative misrepresentation, the plaintiff must prove reliance upon the misrepresentation in order to recover. However, where there is a failure to disclose it would be awkward to suggest that the plaintiff relied upon the *absence* of a fact or circumstance in choosing a course of action. Instead, the plaintiff must prove that, had the defendant disclosed the information in question, the plaintiff would have taken a different course of action. Ordinarily this is incorporated into the plaintiff's proof of the damage that resulted from the failure to disclose—the difference between how the transaction turned out and what the plaintiff now claims would have occurred if the missing information had been disclosed. However, in addition to the plaintiff's assertion that he or she would have acted differently, the missing information must be sufficiently material to justify the remedies for misrepresentation.

[Current as of September 2018.]

WPI 165.03

NEGLIGENT MISREPRESENTATION—FAILURE TO DISCLOSE INFORMATION—DUTY TO DISCLOSE

A party to a business transaction has a duty to disclose to the other party, before the transaction is completed, the following information under [any of] these circumstances:

[(a)] [matters known to him or her that the other is entitled to know because of a fiduciary relationship between them;]

[(b)] [facts basic to the transaction, if the party knows that the other is about to enter into it under a mistake as to them, and that the other, because of the relationship between them, the customs of the trade or other objective circumstances, would reasonably expect a disclosure of those facts;]

[(c)] [matters known to him or her that the other is entitled to know because of a relationship of trust and confidence between them;]

[(d)] [matters known to the party that he or she knows to be necessary to prevent his or her partial or ambiguous statement of the facts from being misleading;]

[(e)] [subsequently acquired information that the party knows will make untrue or misleading a previous representation that when made was true or believed to be so;]

[(f)] [the falsity of a representation made without the expectation that it would be acted upon, if the party subsequently learns that the other is about to act in reliance upon it in their transaction].

[Other than in these circumstances, a party to a business transaction is not required to disclose information to the other party.]

NOTE ON USE

Use this instruction in connection with WPI 165.02 (Negligent Misrepresentation—Failure to Disclose Information—Burden of Proof on the Issues), if there are disputed questions of fact that prevent the court from determining the duty issue as a matter of law. With this instruction, use WPI 165.04 (Negligent Misrepresentation—Failure to Disclose Information—Fiduciary Relationship—Relationship of Trust and Confidence—Definition), as applicable.

Paragraphs (a) and (b) are more likely to involve issues of law that would frequently be resolved by summary judgment, while paragraphs (c) through (f) would frequently involve factual issues for the jury. To the extent that any of these are determined as a matter of law before trial, the instruction would need to be modified accordingly.

Choose from items (a) through (f) according to the facts and claims involved in the particular case. The bracketed final sentence may be used if it would help jurors to better understand the legal framework.

COMMENT

The instruction is based on Section 551(2) of the Restatement (Second) of Torts (1977), which has been adopted as Washington law. See Colonial Imports, Inc. v. Carlton N.W., Inc., 121 Wn.2d 726, 731, 853 P.2d 913 (1993); Guarino v. Interactive Objects, Inc., 122 Wn.App. 95, 129–30, 86 P.3d 1175 (2004). Section 551(2) reads:

> (2) One party to a business transaction is under a duty to exercise reasonable care to disclose to the other before the transaction is consummated,
>
> (a) matters known to him that the other is entitled to know because of a fiduciary or other similar relation of trust and confidence between them; and
>
> (b) matters known to him that he knows to be necessary to prevent his partial or ambiguous statement of the facts from being misleading; and
>
> (c) subsequently acquired information that he knows will make untrue or misleading a previous representation that when made was true or believed to be so; and

(d) the falsity of a representation not made with the expectation that it would be acted upon, if he subsequently learns that the other is about to act in reliance upon it in a transaction with him; and

(e) facts basic to the transaction, if he knows that the other is about to enter into it under a mistake as to them, and that the other, because of the relationship between them, the customs of the trade or other objective circumstances, would reasonably expect a disclosure of those facts.

Duty. Whether or not the defendant owed a duty of care is usually a question of law for the court. Eastwood v. Horse Harbor Foundation, Inc., 170 Wn.2d 380, 394, 241 P.3d 1256 (2010); Schaaf v. Highfield, 127 Wn.2d 17, 21–22, 896 P.2d 665 (1995); Austin v. Ettl, 171 Wn.App. 82, 89, 286 P.3d 85 (2012) (concluding in the context of a CR 12(b)(6) motion that no duty existed). Sometimes, however, cases will arise where the plaintiff and the defendant present conflicting evidence concerning the facts that would give rise to a duty of care. In such cases it may be desirable to craft a special verdict form that would permit the jury to resolve the disputed factual issues while reserving the legal determination to the court. A similar process is contemplated in the determination of whether or not an attorney owes a duty to a putative client, or to a non-client, for purposes of a claim of legal malpractice. See WPI 107.03 (Duty to Non-Client—Special Verdict Form).

Organization of instruction. The organization of paragraphs (a) through (f) in the pattern instruction differs slightly from the organization of paragraphs (a) through (e) of Restatement (Second) of Torts, section 551(2) (1977). Paragraph (a) of the Restatement (Second) has been separated into two separate paragraphs in the pattern instruction, one specific to fiduciary relationships and the other specific to relationships of trust and confidence. Also, the order of the paragraphs has been revised, so that the pattern instruction begins with those paragraphs that tend to involve issues of law and ends with those paragraphs that tend to be more fact-specific.

"Facts basic to the transaction." Paragraph (b) of the instruction refers to facts that are basic to the transaction. A comment to the Restatement (Second) defines "a fact basic to the transaction" as "a fact that is assumed by the parties as a basis for the transaction itself." See comment (j) of Restatement (Second) of Torts § 551 (1977). The comment indicates that the fact must "[go] to the basis, or essence, of the transaction," and that even some "important and persuasive inducements to enter into the transaction" do not necessarily go to its essence. Restatement (Second) of Torts § 551, comment j. In a particular case, jurors may need to be instructed in these regards. In other cases, the

facts that are basic to a transaction may be determined by a statute, in which case the instructions would need to incorporate the statutory language.

Instruction—Exception to the general rule of caveat emptor. The instruction sets forth circumstances under which one party to a business transaction owes a duty to disclose information to the other party. Such circumstances serve as exceptions to the general rule that "participants in a business transaction deal at arm's length; it has been said that an individual has no particular duty to disclose facts nor any particular right to rely on the statements of the party with whom he contracts at arm's length." Annechino v. Worthy, 175 Wn.2d 630, 636, 290 P.3d 126 (2012) (quoting Liebergesell v. Evans, 93 Wn.2d 881, 889, 613 P.2d 1170 (1980)).

[Current as of September 2018.]

WPI 165.03.01

DUTY TO DISCLOSE—MIXED ISSUES OF FACT AND LAW

(Name of plaintiff) **has the burden of proving that** (name of defendant) **owed a duty to disclose information to** (name of plaintiff).

In deciding whether this burden has been met, you are to consider whether the following [fact has] [facts have] been proved:

(Insert here the factual issues that the jury will need to resolve before the court can decide whether the duty is owed; see the Note on Use and Comment.)

You have been given a special verdict form that asks you whether [this fact has] [these facts have] been proved. Fill in the special verdict form according to your answer. Follow the directions on the special verdict form for what to do next.

NOTE ON USE

This instruction will rarely be needed. Whether the defendant had a duty to disclose will often be determined by the judge as a matter of law during pre-trial proceedings. For those cases in which a factual issue precludes a decision as a matter of law, this instruction may be used to submit the factual issue to the jury.

This instruction is to be used with the special verdict form found at WPI 165.03.02 (Duty to Disclose—Mixed Issues of Fact and Law—Special Verdict Form).

COMMENT

Whether the defendant owes a duty of care is usually a question of law for the court. Eastwood v. Horse Harbor Foundation, Inc., 170 Wn.2d 380, 394, 241 P.3d 1256 (2010); Schaaf v. Highfield, 127 Wn.2d 17, 21–22, 896 P.2d 665 (1995); Austin v. Ettl, 171 Wn.App. 82, 89, 286 P.3d 85 (2012) (concluding in the context of a CR 12(b)(6) motion that no duty existed).

Sometimes, however, cases will arise in which the plaintiff and the

defendant present conflicting evidence concerning the facts that would give rise to a duty of care. For such cases, the pattern instruction can be used to submit the factual issue to the jury. The accompanying special verdict form, WPI 165.03.02 (Duty To Disclose—Mixed Issues of Fact And Law—Special Verdict Form), can be used to record the jury's answer and to inform jurors about the next step in their deliberations—in routine cases, jurors would be told that a "yes" answer means that they should then consider the remaining elements of the negligent misrepresentation claim, while a "no" answer means that their deliberations on that claim are completed.

A similar approach for addressing mixed questions of law and fact relating to the existence of a duty is found in the chapter on legal malpractice. See WPI 107.02 (Duty to Non-Client) and WPI 107.03 (Duty to Non-Client—Special Verdict Form).

[Current as of September 2018.]

WPI 165.03.02

DUTY TO DISCLOSE—MIXED ISSUES OF FACT AND LAW—SPECIAL VERDICT FORM

QUESTION: Did (name of plaintiff) **prove the following fact[s] by clear, cogent, and convincing evidence:**

(Insert the disputed facts that the jury needs to resolve before the court can decide whether the duty is owed. A sample question is set forth in the Comment below.)

ANSWER: _____ (Write "yes" or "no")

(DIRECTION: If your answer is "yes," then you will proceed to consider the other elements of the plaintiff's [negligent misrepresentation] claim.

If your answer is "no," then your verdict is complete for this claim.)

NOTE ON USE

This verdict form accompanies WPI 165.03.01 (Duty to Disclose—Mixed Issues of Fact and Law). This verdict form and the instruction apply only in the unusual circumstances discussed in the Note on Use and Comment to WPI 165.03.01 (Duty to Disclose—Mixed Issues of Fact and Law). The claims in the case will determine how practitioners tailor further directions to the jury about how to proceed.

COMMENT

When plaintiff's burden of proof is something other than a preponderance of the evidence, practitioners should specify the burden in the special verdict form. In this special verdict form the jury is asked whether the plaintiff has proven the necessary facts by clear, cogent, and convincing evidence.

The questions to include in this verdict form will depend on the factual dispute involved in the particular case. Practitioners will need to insure that the answer to the factual question posed to the jury is dispositive of the duty issue. In other words, the question needs to be phrased so that if the fact has been proved, a duty exists, whereas if the fact is not proved there is no duty. The special verdict form can then be

tailored to guide the jurors as to what further questions, if any, follow from the resolution of the duty issue.

For example, in a case involving an alleged relationship of trust and confidence (see WPI 165.04 (Negligent Misrepresentation—Failure To Disclose Information—Fiduciary Relationship—Relationship of Trust And Confidence—Definitions), the following question can be used if a "yes" answer would mean that the defendant had a duty to disclose and a "no" answer would mean that no duty existed:

> Did (name of plaintiff) prove by clear, cogent, and convincing evidence that (name of defendant) purported to act or advise with (name of plaintiff)'s interest in mind?

For more complicated scenarios, another approach will be needed.

A similar approach for addressing mixed questions of law and fact relating to the existence of a duty is found in the chapter on legal malpractice. See WPI 107.02 (Duty to Non-Client) and WPI 107.03 (Duty to Non-Client—Special Verdict Form).

[Current as of September 2018.]

WPI 165.04

NEGLIGENT MISREPRESENTATION—FAILURE TO DISCLOSE INFORMATION—FIDUCIARY RELATIONSHIP—RELATIONSHIP OF TRUST AND CONFIDENCE—DEFINITIONS

[A fiduciary relationship exists when one person has a duty to act primarily for the benefit of another. [A fiduciary relationship existed between (name of party) **and** (name of other party)**.] [**(Name of party) **and** (name of other party) **had a fiduciary relationship if you find that** (insert facts that are in dispute)**.]]**

[A relationship of trust and confidence exists when one person has gained the trust and confidence of the other and purports to act or advise with the other's interest in mind.]

NOTE ON USE

The instruction defines terms used in WPI 165.03 (Negligent Misrepresentation—Failure to Disclose Information—Duty to Disclose).

Use the first paragraph for cases involving a fiduciary duty. Within that paragraph, the first sentence would always be used. Choose between the second and third sentences depending on whether there are any remaining issues for the jury to resolve. Most often, the paragraph's second sentence would be used, instead of the third, because the existence of a fiduciary duty will usually already have been determined by the trial judge as a matter of law.

Use the second paragraph for cases involving a relationship of trust and confidence. Factual issues will often exist for these relationships.

COMMENT

A good summary of this area of the law is set forth in Goodyear Tire & Rubber Co. v. Whiteman Tire, Inc., 86 Wn.App. 732, 741–42, 935 P.2d 628 (1997):

> Fiduciary relationships include those historically regarded as fiduciary, and also may arise in circumstances in which 'any person whose relation with another is such that the latter justifiably expects his welfare to be cared for by the former.' Liebergesell v.

> Evans, 93 Wash.2d 881, 890–91, 613 P.2d 1170 (1980). In general, "[a] fiduciary relationship imparts a position of *peculiar confidence placed by one individual in another*. A fiduciary is a person with a duty to act *primarily for the benefit of another*." Denison State Bank v. Madeira, 230 Kan. 684, 230 Kan. 815, 640 P.2d 1235, 1241 (1982). 'The facts and circumstances must indicate that the one reposing the trust has foundation for his belief that the one giving advice or presenting arguments is acting not in his own behalf, but in the interests of the other party.' Burwell v. South Carolina Nat'l Bank, 288 S.C. 34, 340 S.E.2d 786, 790 (1986). In other words, the plaintiff must show some dependency on his or her part and some undertaking by the defendant to advise, counsel and protect the weaker party. For example, a plaintiff's lack of business expertise, and a defendant's undertaking the responsibility of providing financial advice to a close friend or family member, may indicate a fiduciary relationship. McGowan v. Pillsbury Co., 723 F.Supp. 530, 536 (W.D.Wash. 1989).

(Emphasis in original.) See also In re Jones, 170 Wn.App. 594, 606, 287 P.3d 610 (2012) (a "confidential relationship exists when one person has gained the confidence of the other and purports to act or advise with the other's interest in mind"); Endicott v. Saul, 142 Wn.App. 899, 923, 176 P.3d 560 (2008) (same holding as in *Jones*); Cummings v. Guardianship Servs. of Seattle, 128 Wn.App. 742, 755 n.33, 110 P.3d 796 (2005) (a "fiduciary is a person with a duty to act primarily for the benefit of another"); Guarino v. Interactive Objects, Inc., 122 Wn.App. 95, 128, 86 P.3d 1175 (2004) (same holding as in *Cummings*).

Washington case law sometimes refers to the relationship of trust and confidence as a quasi-fiduciary relationship. See, e.g., Colonial Imports, Inc. v. Carlton N.W., Inc., 121 Wn.2d 726, 732, 853 P.2d 913 (1993) (quoting Favors v. Matzke, 53 Wn.App. 789, 796, 770 P.2d 686 (1989)).

[Current as of September 2018.]

WPI 165.05

NEGLIGENT MISREPRESENTATION—CLEAR, COGENT, AND CONVINCING EVIDENCE

Proof by clear, cogent, and convincing evidence means that the element must be proved by evidence that carries greater weight and is more convincing than a preponderance of evidence. Clear, cogent, and convincing evidence exists when occurrence of the element has been shown by the evidence to be highly probable. However, it does not mean that the element must be proved by evidence that is convincing beyond a reasonable doubt.

A "preponderance of the evidence" means that you must be persuaded, considering all the evidence in the case, that a proposition is more probably true than not true. "Preponderance of the evidence" is defined here solely to aid you in understanding the meaning of "clear, cogent, and convincing."

NOTE ON USE

Use this instruction when the jury has not been given WPI 21.01 (Meaning of Burden of Proof—Preponderance of the Evidence). If there is an alternative claim involving preponderance of the evidence so that WPI 21.01 (Meaning of Burden of Proof—Preponderance of the Evidence) is also given, use WPI 165.06 (Negligent Misrepresentation—Clear, Cogent, and Convincing Evidence—Combined with Preponderance of Evidence), instead of this instruction.

COMMENT

Negligent misrepresentation must be proved by clear, cogent, and convincing evidence. Ross v. Kirner, 162 Wn.2d 493, 499, 172 P.3d 701 (2007); Van Dinter v. Orr, 157 Wn.2d 329, 333, 138 P.3d 608 (2006); DeWolf & Allen, 16A Washington Practice, Tort Law & Practice § 19:12 (4th ed.).

"Clear, cogent, and convincing evidence" denotes a quantum of evidence or degree of proof greater than a mere preponderance, but something less than proof beyond a reasonable doubt. In re Deming, 108 Wn.2d 82, 109–10, 736 P.2d 639 (1987); Tiger Oil Corp. v. Yakima County, 158 Wn.App. 553, 562, 242 P.3d 936 (2010). A failure to advise

the jury that "clear, cogent, and convincing" proof is a higher degree of proof than a "preponderance of evidence" constitutes reversible error. Holmes v. Raffo, 60 Wn.2d 421, 425–26, 374 P.2d 536 (1962).

The high probability standard is now well established as a means for defining clear, cogent, and convincing evidence. See, e.g., In re J.A.F., 168 Wn.App. 653, 667, 278 P.3d 673 (2012); Wright v. Dave Johnson Ins. Inc., 167 Wn.App. 758, 774, 275 P.3d 339 (2012). See generally DeWolf & Allen, 16A Washington Practice, Tort Law & Practice § 19:27 (4th ed.); Tegland, 5 Washington Practice, Evidence Law and Practice § 301.3 (6th ed.).

[Current as of September 2018.]

WPI 165.06

NEGLIGENT MISREPRESENTATION—CLEAR, COGENT, AND CONVINCING EVIDENCE—COMBINED WITH PREPONDERANCE OF EVIDENCE

A party who alleges negligent misrepresentation has the burden of proving each of the elements of negligent misrepresentation by clear, cogent, and convincing evidence. However, this burden of proof is applicable only to the proof of negligent misrepresentation. All other allegations of [plaintiff] [defendant] [the respective parties] must be proved by a preponderance of the evidence as that term is more fully defined in other instructions.

Proof by clear, cogent, and convincing evidence means that the element must be proved by evidence that carries greater weight and is more convincing than a preponderance of evidence. Clear, cogent, and convincing evidence exists when occurrence of the element has been shown by the evidence to be highly probable. However, it does not mean that the element must be proved by evidence that is convincing beyond a reasonable doubt.

NOTE ON USE

Use bracketed material as applicable.

Use WPI 21.01 (Meaning of Burden of Proof—Preponderance of the Evidence), and this instruction in any case in which it is necessary to instruct on "preponderance of the evidence" as well as on the burden of proof involved in an allegation of negligent misrepresentation.

COMMENT

If the court also has instructed the jury on "preponderance of the evidence" (WPI 21.01 (Meaning of Burden of Proof—Preponderance of the Evidence)), a general instruction on the burden of proof in negligent misrepresentation cases would give the jury two tests for burden of proof that appear to be in conflict. Failure to give a clarifying instruction on the different burdens of proof is reversible error. Adjustment Dept., Olympia Credit Bureau v. Smedegard, 40 Wn.2d 76, 77–79, 241 P.2d 203 (1952). This instruction is designed to resolve this issue.

For a discussion of clear, cogent, and convincing evidence, see the Comment to WPI 165.05 (Negligent Misrepresentation—Clear, Cogent, and Convincing Evidence).

[Current as of September 2018.]

PART XIII

CONTRACTS

CHAPTER 300 CONTRACTS—ISSUES—BURDEN OF PROOF

CHAPTER 301 CONTRACTS—FORMATION, INTERPRETATION, AND ENFORCEABILITY

CHAPTER 301A EQUITABLE ALTERNATIVES—PROMISSORY ESTOPPEL AND QUASI CONTRACT

CHAPTER 302 CONTRACTS—PERFORMANCE AND BREACH

CHAPTER 303 CONTRACTS—REMEDIES

CHAPTER 300

CONTRACTS—ISSUES—BURDEN OF PROOF

WPI 300.00 Introduction
WPI 300.01 Issues—Breach of Contract—Damages
WPI 300.01.01 Issues—Contract—Alternative
WPI 300.02 Burden of Proof on the Issues—Breach of Contract—No Affirmative Defense
WPI 300.03 Burden of Proof on the Issues—Breach of Contract—With Affirmative Defenses

---

WPI 300.00

INTRODUCTION

The subject of contracts is necessarily broad. The WPI Committee has drafted pattern instructions that address some of the more common issues in this broad field.

The instructions in Part XIII are designed for use in non-Uniform

Commercial Code cases. For Uniform Commercial Code cases, see RCW Title 62A, and particularly the Washington Comments set forth in the RCW Annotated. Employment issues are addressed separately in WPI Part XVI (Employment). Consumer protection issues are addressed in WPI Part XIV (Consumer Protection).

Broad instructions on the issues and on burden of proof are set forth in WPI Chapter 300. These instructions are designed for a breach of contract action for damages, with and without affirmative defenses. The remaining wide variety of types of contract actions are addressed in the skeletal format of WPI 300.01.01 (Issues—Contract—Alternative).

Issues of contract formation, interpretation, and enforcement are addressed in WPI Chapter 301. The WPI Committee has elected not to address a number of specific contract formation issues in the form of pattern instructions because such issues are rarely presented for jury resolution. A number of bases for the equitable remedy of rescission, such as mutual or unilateral mistake, or undue influence, may also be asserted as defenses to contract enforcement, and it is in this context that the WPI Committee felt they would be most likely to reach a jury.

Equitable alternative remedies are presented separately in WPI Chapter 301A. Although the role of the jury with respect to these issues may be different from the jury's role as fact finder in a strictly legal breach of contract cause of action, as a practical matter these issues are often presented to juries together with, and as alternatives to, legal claims.

Some of the more common issues related to performance of contractual duties, excuses for nonperformance, and breaches of contract are addressed in WPI Chapter 302. These instructions are drafted for the context in which they are most likely to arise in a breach of contract action. For example, defenses that, if established, would either relieve or discharge a defendant's duty of performance are labeled "excuse of performance," even though they may also be raised in a number of different procedural postures.

The chapter on remedies, WPI Chapter 303, focuses on the action for damages for breach of contract, because that is the legal remedy with which juries are most naturally concerned. The potential advisory role of the jury in making findings that may assist the court in fashioning equitable remedies, however, suggests that it may be necessary in specific cases to develop a number of verdict forms with specific interrogatories.

For comprehensive discussions of non-U.C.C. contract issues in Washington courts, see generally DeWolf, Allen, and Caruso, 25 Washington Practice: Contract Law and Practice (3rd ed.).

[Current as of September 2018.]

WPI 300.01

ISSUES—BREACH OF CONTRACT—DAMAGES

The following is a summary of the claims of the parties provided to help you understand the issues in the case. You are not to take this instruction as proof of the matters claimed. It is for you to decide, based upon the evidence presented, whether a claim has been proved.

(1) The plaintiff, (name of plaintiff), **claims that the defendant,** (name of defendant), **entered into a contract with [him] [her] [it] [to] [for]** (insert general terms of alleged contract). (Name of plaintiff) **claims that** (name of defendant) **breached this contract [by] [in one or more of the following respects:]**

(Set forth in simple form without undue emphasis or repetition plaintiff's claims of breach that have not been withdrawn or stricken by the court and are supported by the evidence. Use the last bracketed phrase above if there is more than one claim of breach.)

(Name of plaintiff) **also claims that [he] [she] [it] sustained damages as a result of [this] [these] breach[es] of the contract, and [he] [she] [it] seeks a judgment against** (name of defendant) **for these damages.**

(Name of defendant) **denies [this claim] [these claims].**

(2) [In addition, (name of defendant) **claims as [an] affirmative defense[s]:**

(Set forth in simple form without undue emphasis or repetition any affirmative defense that has not been withdrawn or stricken by the court and is supported by the evidence.)

(Name of plaintiff) **denies [this claim] [these claims].]**

(3) [(Name of defendant) further denies that (name of plaintiff) was damaged.]

(4) [(Name of defendant) further denies the nature and extent of the claimed damage.]

NOTE ON USE

This instruction is patterned after WPI 20.01 (Issues). The instruction is adapted for a plaintiff's breach of contract action when the plaintiff is seeking damages. Use the bracketed material as applicable to the case.

If the case has contract issues, but does not involve a plaintiff's breach of contract action, or if the plaintiff is seeking a remedy other than damages, adapt the simplified form of WPI 300.01.01 (Issues—Contract—Alternative).

The numbers in parentheses preceding each paragraph should not be included when the instruction is given. They are used here for convenience in referring to paragraphs in this note and when instructions are being prepared for a particular case. Paragraph (1) will always be used. The pertinent bracketed paragraphs (2) through (4) should be selected according to the issues properly in the case and supported by the evidence. A particular case may require additional modifications.

This instruction and WPI 300.02 (Burden of Proof on the Issues—Breach of Contract—No Affirmative Defense) or WPI 300.03 (Burden of Proof on the Issues—Breach of Contract—With Affirmative Defenses) are designed to be used in most simple breach of contract cases. More specific instructions regarding contract formation issues, set forth in WPI Chapter 301, should be used if the jury is called upon to resolve those particular issues. Performance and breach issues are set forth in WPI Chapter 302, and damage instructions are set forth in WPI Chapter 303.

When reference to admissions is appropriate, use WPI 6.10.02 (Use of Admissions or Binding Stipulations Under CR 36(b)).

These instructions are designed for use in non-Uniform Commercial Code cases. For Uniform Commercial Code cases, see RCW Title 62A, and particularly the Washington Comments set forth in the RCW Annotated. For employment contract issues, see WPI Part XVI (Employment). For consumer protection issues, see WPI Part XIV (Consumer Protection).

COMMENT

Generally, a plaintiff in a contract action must prove a valid

contract between the parties, a breach, and resulting damage. Lehrer v. State, Dept. of Social and Health Services, 101 Wn.App. 509, 516, 5 P.3d 722 (2000); Northwest Independent Forest Mfrs. v. Department of Labor and Industries, 78 Wn.App. 707, 712, 899 P.2d 6 (1995).

For a discussion of actual damages versus nominal damages, see the Comment to WPI 303.01 (Measure of Expectation Damages—Breach of Contract—No Counterclaim).

For comprehensive discussions of non-U.C.C. contract issues in Washington courts, see DeWolf, Allen, and Caruso, 25 Washington Practice, Contract Law and Practice (3rd ed.).

See the Comment to WPI 20.01 (Issues).

[Current as of September 2018.]

WPI 300.01.01

ISSUES—CONTRACT—ALTERNATIVE

The following is a summary of the claims of the parties provided to help you understand the issues in the case. You are not to take this instruction as proof of the matters claimed. It is for you to decide, based upon the evidence presented, whether a claim has been proved.

(1) The plaintiff, (name of plaintiff)**, claims:**

(Set forth in simple form without undue emphasis or repetition plaintiff's claims that have not been withdrawn or stricken by the court and are supported by the evidence.)

The defendant, (name of defendant)**, denies [this claim] [these claims].**

(2) [In addition, (name of defendant) **claims:**

(Set forth in simple form without undue emphasis or repetition defendant's claims, including any affirmative defenses that have not been withdrawn or stricken by the court and are supported by the evidence.)

(Name of plaintiff) **denies [this claim] [these claims].]**

NOTE ON USE

When the plaintiff is suing for damages for breach of contract, use WPI 300.01 (Issues—Breach of Contract—Damages) instead of this instruction. This instruction's simplified format is designed for cases involving other contract issues.

See the Note on Use and Comment to WPI 300.01 (Issues—Breach of Contract—Damages). See also WPI 20.01 (Issues).

[Current as of September 2018.]

WPI 300.02

BURDEN OF PROOF ON THE ISSUES—BREACH OF CONTRACT—NO AFFIRMATIVE DEFENSE

The plaintiff, (name of plaintiff), **has the burden of proving each of the following propositions on [his] [her] [its] claim of breach of contract:**

[(1)] [That the defendant, (name of defendant), **entered into a contract with** (name of plaintiff)**];**

[(2)] [That the terms of the contract included:]

(Here insert a general statement of material terms);

[(3)] [That (name of defendant) **breached the contract [as] [in one or more of the ways] claimed by** (name of plaintiff)**];**

[(4)] [That (name of plaintiff) **[was not in [material] breach of] [had performed or offered to perform its obligations under] [was excused from performing its obligations under] the contract];**

[(5)] [That (here insert any condition precedent the occurrence of which plaintiff must prove) **had occurred];**

[(6)] [That (name of plaintiff) **was damaged as a result of** (name of defendant's) **breach].**

If you find from your consideration of all the evidence that each of these propositions has been proved, your verdict should be for (name of plaintiff) **[on this claim]. On the other hand, if any of these propositions has not been proved, your verdict should be for** (name of defendant) **[on this claim].**

NOTE ON USE

Use this instruction for breach of contract actions not involving any

affirmative defenses. The instruction will need to be revised if the contract claim is being brought by a party other than the plaintiff.

This instruction is patterned after WPI 21.02 (Burden of Proof on the Issues—No Affirmative Defense), adapted for use in a standard breach of contract case. Depending upon the issues remaining in the case, select the appropriate paragraphs (1) through (6).

Use this instruction in combination with an appropriate instruction from WPI Chapter 303 (Contracts—Remedies).

Regarding bracketed paragraphs (4) and (5), see the Comment's discussion about conditions precedent and material breaches of contract. Consider whether it would be appropriate to use WPI 302.02 (Conditions Precedent or Conditions Concurrent), in combination with this instruction.

Regarding bracketed paragraph (6), see the Comment to WPI 303.01 (Measure of Expectation Damages—Breach of Contract—No Counterclaim), for a discussion of actual damages versus nominal damages.

When the case involves only issues that require proof by a preponderance of evidence, use this instruction with WPI 21.01 (Meaning of Burden of Proof—Preponderance of the Evidence). When the case also involves issues, such as fraud, that require proof by clear, cogent, and convincing evidence, use this instruction with WPI 160.03 (Fraud—Burden of Proof—Combined with Preponderance of Evidence).

Use this instruction with WPI 300.01 (Issues—Breach of Contract—Damages).

If there are affirmative defenses to be considered by the jury, use WPI 300.03 (Burden of Proof on the Issues—Breach of Contract—With Affirmative Defenses).

If there is a counterclaim for damages by defendant, set forth the alternative findings as in WPI 21.04 (Burden of Proof on the Issues—Counterclaim), adapted for a contract action.

In a case in which some of the elements of the claim have been admitted by the party defending the claim, it may be appropriate to insert a reference to such admissions. Cf. WPI 6.10.02 (Use of Admissions or Binding Stipulations under CR 36(b)), and WPI Chapter 23 (Admitted Liability).

COMMENT

For the essential elements of a breach of contract claim, see the Comment to WPI 300.01 (Issues—Breach of Contract—Damages).

Burden of proof. The appropriate standard of proof for a breach, even when the alleged breach consists of misrepresentation or concealment of a material fact (in an insurance claim), is a preponderance of evidence rather than clear, cogent, and convincing evidence. Allstate Ins. Co. v. Huston, 123 Wn.App. 530, 542, 94 P.3d 358 (2004); St. Paul Mercury Ins. Co. v. Salovich, 41 Wn.App. 652, 657, 705 P.2d 812 (1985).

Conditions precedent. With regard to paragraphs (4) and (5), the "party seeking enforcement of the contract has the burden of proving performance of an express condition precedent." Walter Implement, Inc. v. Focht, 107 Wn.2d 553, 557, 730 P.2d 1340 (1987), citing Ross v. Harding, 64 Wn.2d 231, 391 P.2d 526 (1964).

"If a contract requires performance by both parties, the party claiming nonperformance of the other must establish as a matter of fact the party's own performance." Willener v. Sweeting, 107 Wn.2d 388, 394, 730 P.2d 45 (1986), quoted in Wallace Real Estate Inv., Inc. v. Groves, 124 Wn.2d 881, 897, 881 P.2d 1010 (1994).

It has also been said that "one who seeks to enforce the terms of a contract against another or to recover damages for the breach of a contract by another must show that there has been no breach on his own part." Downs v. Smith, 169 Wash. 203, 13 P.2d 440 (1932). This applies unless the defendant's performance is a condition precedent to plaintiff's performance (i.e., the duties are not concurrent), or unless plaintiff's performance is otherwise excused or discharged. Willener v. Sweeting, 107 Wn.2d 388, 730 P.2d 45 (1986). In *Willener*, duties were concurrent and neither party performed, so neither could claim damages for breach. See the Comment to WPI 302.02 (Conditions Precedent or Conditions Concurrent).

Materiality of breach. Although the quotation above from *Willener* and *Wallace* suggests that even a trivial breach by the plaintiff of a condition precedent will preclude the plaintiff from recovering for a defendant's breach, Washington cases do not necessarily so hold. For example, in Jacks v. Blazer, 39 Wn.2d 277, 285, 235 P.2d 187 (1951), the court held that a "breach or non-performance of a promise by one party to a bilateral contract, so material as to justify a refusal of the other party to perform a contractual duty, discharges that duty." See also Rosen v. Ascentry Technologies, Inc., 143 Wn.App. 364, 177 P.3d 765 (2008) (quoting *Jacks*); Dwinell's Central Neon v. Cosmopolitan Chinook Hotel, 21 Wn.App. 929, 936–37, 587 P.2d 191 (1978) (quoting *Jacks*).

Neither *Willener* nor *Wallace* necessarily alters this principle. See Willener v. Sweeting, 107 Wn.2d 388, 394, 730 P.2d 45 (1986) (the court's analysis incorporated materiality of the breach by addressing whether the plaintiffs sufficiently performed under the agreement to

claim the defendants' nonperformance); Wallace Real Estate Inv., Inc. v. Groves, 124 Wn.2d 881, 897–99, 881 P.2d 1010 (1994) (the court did not need to address materiality, because the breach related to the plaintiff's primary duty under the contract—to tender payment for the goods being purchased). Due to the unsettled nature of the law, the word "material" is bracketed in the instruction.

Affirmative defense. Under some contracts, the plaintiff's performance of a contractual obligation is not made a condition precedent to the defendant's performance. For these contracts, the burden of proving whether the plaintiff breached the contract rests with the defendant, rather than the plaintiff, as an affirmative defense. See Wlasiuk v. Whirlpool Corp., 81 Wn.App. 163, 178–79, 914 P.2d 102 (1996); DeWolf, Allen, and Caruso, 25 Washington Practice, Contract Law and Practice § 10:3 (3rd ed.).

With regard to paragraph (6), see the portion of the Comment to WPI 303.01 (Measure of Expectation Damages—Breach of Contract—No Counterclaim) related to damages as a substantive element of plaintiff's case.

[Current as of September 2018.]

WPI 300.03

BURDEN OF PROOF ON THE ISSUES—BREACH OF CONTRACT—WITH AFFIRMATIVE DEFENSES

(Name of plaintiff) **has the burden of proving each of the following propositions on [his] [her] [its] claim of breach of contract:**

[(1)] **That** (name of defendant) **entered into a contract with** (name of plaintiff)**;**

[(2)] **[That the terms of the contract included:]**

(Here insert a general statement of material terms);

[(3)] **[That** (name of defendant) **breached the contract [as] [in one or more of the ways] claimed by** (name of plaintiff)**];**

[(4)] **[That** (name of plaintiff) **[was not in [material] breach of] [had performed or offered to perform its obligations under] [was excused from performing its obligations under] the contract];**

[(5)] **[That** (here insert any condition precedent the occurrence of which plaintiff must prove) **had occurred];**

[(6)] **[That** (name of plaintiff) **was damaged as a result of** (name of defendant's) **breach].**

If you find from your consideration of all the evidence that any of these propositions has not been proved, your verdict should be for (name of defendant)**. On the other hand, if each of these propositions has been proved, then you must consider the affirmative defense[s] claimed by** (name of defendant).

(Name of defendant) **has the burden of proving the following affirmative defense[s]:**

(Here set forth the necessary elements of any affirmative defenses that are at issue.)

If you find from your consideration of all the evidence that [this affirmative defense has] [one or more of these affirmative defenses have] been proved, your verdict should be for (name of defendant) **[on this claim]. On the other hand, if [this affirmative defense has not] [none of these affirmative defenses have] been proved, then your verdict should be for** (name of plaintiff) **[on this claim].**

NOTE ON USE

Use this instruction when the defendant responds to the plaintiff's breach of contract claim with one or more affirmative defenses. If the defendant has not raised an affirmative defense, use WPI 300.02 (Burden of Proof on the Issues—Breach of Contract—No Affirmative Defense).

The instruction will need to be revised if the contract claim is being brought by a party other than the plaintiff.

Use this instruction with WPI 300.01 (Issues—Breach of Contract—Damages), when the defendant has raised at least one affirmative defense that presents an issue for the jury.

Regarding use of paragraphs (4) and (5), see the Note on Use and Comment to WPI 300.02 (Burden of Proof on the Issues—Breach of Contract—No Affirmative Defense). Regarding paragraph (6), see the discussion of actual damages versus nominal damages in the Comment to WPI 303.01 (Measure of Expectation Damages—Breach of Contract—No Counterclaim).

The last paragraph of this instruction is patterned after WPI 21.05 (Burden of Proof on the Issues—Affirmative Defenses Other Than Contributory Negligence/Assumption of Risk). It assumes that the affirmative defense is a complete bar to recovery. When that is not the case, the paragraph must be modified accordingly.

When the case involves only issues that require proof by a preponderance of evidence, use this instruction with WPI 21.01 (Meaning of Burden of Proof—Preponderance of the Evidence). When the case also involves issues, such as fraud, that require proof by clear, cogent, and convincing evidence, use this instruction with WPI 160.03 (Fraud—Burden of Proof—Combined with Preponderance of Evidence).

When the case involves a counterclaim for damages by defendant,

set forth the alternative findings as in WPI 21.04 (Burden of Proof on the Issues—Counterclaim), adapted for a contract action.

When the affirmative defense goes to the enforceability of the contract, it may be appropriate to use this instruction in combination with WPI 301.08 (Enforceability—Mutual Mistake), WPI 301.09 (Enforceability—Unilateral Mistake), WPI 301.10 (Enforceability—Duress), or WPI 301.11 (Enforceability—Undue Influence). When the affirmative defense excuses or discharges the duty of performance, it may be appropriate to use this instruction in combination with an appropriate instruction as set forth in WPI Chapter 302 (Contracts—Performance and Breach), including WPI 302.07 (Excuse of Performance—Waiver), WPI 302.06 (Excuse of Performance—Estoppel), WPI 302.08 (Excuse of Performance—Interference With Contractual Performance), and WPI 302.09 (Excuse of Performance—Impossibility or Impracticability).

COMMENT

See the Comment to WPI 300.02 (Burden of Proof—Breach of Contract—No Affirmative Defense), for discussion of portions of the instruction related to the plaintiff's case.

Affirmative defenses listed in CR 8(c) include accord and satisfaction, arbitration and award, discharge in bankruptcy, duress, estoppel, failure of consideration, fraud, illegality, payment and release, res judicata, statute of frauds, statute of limitation, and waiver.

Generally, such defenses can be divided into those that affect the enforceability of the contract, and those that discharge the duty of the defendant to perform under the contract.

Affirmative defenses affecting enforceability. Included among those that arise during the contracting phase, and affect the enforceability of the contract, are mutual or unilateral mistake, duress or undue influence, fraud or misrepresentation, illegality, statute of frauds, statute of limitations, and lack of competency or capacity. While these issues may be raised just as easily by plaintiffs seeking rescission of a contract as by defendants seeking avoidance of a contract, they are considered here in the role of affirmative defenses. See generally the instructions and Comments in WPI Chapter 301 (Contracts—Formation, Interpretation and Enforceability), including WPI 301.08 (Enforceability—Mutual Mistake), WPI 301.09 (Enforceability—Unilateral Mistake), WPI 301.10 (Enforceability—Duress), and WPI 301.11 (Enforceability—Undue Influence).

When fraud is asserted as an affirmative defense, there must be evidence of the nine elements required to prove fraud, as set forth in WPI

160.01 (Elements of Fraud). See Lambert v. State Farm Mut. Auto. Ins. Co., 2 Wn.App. 136, 141, 467 P.2d 214 (1970).

Affirmative defenses discharging or excusing performance. Other affirmative defenses arise out of conditions or events occurring during or affecting the course of performance, and are said to discharge or excuse a party's duty of performance. Just as with defenses that go to enforceability, when the party asserting the discharge or excuse is a defendant, then it is appropriate to term such claims affirmative defenses, but it should be noted that they might equally be asserted by the party bringing the action. These include laches or estoppel, waiver, prevention or hindrance of performance, or failure of consideration. See generally the instructions and Comments in WPI Chapter 302 (Contracts—Performance and Breach), including WPI 302.06 (Excuse of Performance—Estoppel), WPI 302.07 (Excuse of Performance—Waiver), WPI 302.08 (Excuse of Performance—Interference with Contractual Performance), WPI 302.09 (Excuse of Performance—Impossibility or Impracticability), and WPI 302.10 (Excuse of Performance—Frustration of Purpose). Subsequent conduct, such as accord and satisfaction, would also be included in this category.

Materiality of breach. For a discussion of this issue, see the Comment to WPI 300.02 (Burden of Proof on the Issues—Breach of Contract—No Affirmative Defense).

[Current as of September 2018.]

CHAPTER 301

CONTRACTS—FORMATION, INTERPRETATION, AND ENFORCEABILITY

WPI 301.01 Contract Defined
WPI 301.02 Promise Defined
WPI 301.03 Mutual Assent
WPI 301.04 Consideration
WPI 301.05 Contract Interpretation
WPI 301.06 Parol Evidence
WPI 301.07 Contract Modification
WPI 301.08 Enforceability—Mutual Mistake
WPI 301.09 Enforceability—Unilateral Mistake
WPI 301.10 Enforceability—Duress
WPI 301.11 Enforceability—Undue Influence

WPI 301.01

CONTRACT DEFINED

A contract is a legally enforceable promise or set of promises. [In order for a promise or set of promises to be legally enforceable, there must be [mutual assent] [and] [consideration].]

NOTE ON USE

Use this instruction when the existence of a contract or its terms is at issue. This instruction will ordinarily be given with WPI 300.01 (Issues—Breach of Contract—Damages), or 300.01.01 (Issues—Contract—Alternative), which would set forth the statement of claims.

The entire second sentence, and each of the terms "mutual assent" and "consideration," are in brackets to indicate that it may or may not be appropriate to present these terms to the jury, depending upon the issues in the case. If the second sentence is given, and mutual assent is an issue, use the term "mutual assent" in the second sentence and use this instruction together with WPI 301.03 (Mutual Assent). If the second sentence is given, and consideration is an issue, use "consideration" in

that sentence and use this instruction together with WPI 301.04 (Consideration).

When the jury must decide whether a promise has been made, use this instruction with WPI 301.02 (Promise Defined). When it is contended that a promise should be enforceable on the basis of promissory estoppel rather than consideration, see the Comment to WPI 301A.01 (Promissory Estoppel).

COMMENT

The Restatement (Second) of Contracts § 1 (1981) provides: "A contract is a promise or set of promises for the breach of which the law gives a remedy, or the performance of which the law recognizes as a duty." An agreement, on the other hand, "is a manifestation of mutual assent by two or more persons to one another," and "has a wider meaning than contract, bargain or promise." Corbit v. J. I. Case Co., 70 Wn.2d 522, 531, 424 P.2d 290 (1967), quoting Restatement (Second) of Contracts § 3 and comment a.

A unilateral contract consists of a promise only on the part of the offeror, and performance of the required terms by the offeree. Storti v. Univ. of Wash., 181 Wn.2d 28, 330 P.3d 159 (2014) (trial court properly found that unilateral contract between university and professor had not been breached); Cascade Auto Glass, Inc. v. Progressive Cas. Ins. Co., 135 Wn.App. 760, 145 P.3d 1253 (2006) (trial court properly enforced unilateral modification to terminable-at-will contract; otherwise contract would be illusory).

[Current as of September 2018.]

WPI 301.02

PROMISE DEFINED

A promise is an expression that justifies the person to whom it is made in reasonably believing that a commitment has been made that something specific will happen or not happen in the future. A promise may be expressed orally, in writing, or by conduct.

NOTE ON USE

Use this instruction with WPI 301.01 (Contract Defined) when the formation of the contract has been put at issue by the pleadings and the evidence, and the jury must decide whether a promise has been made. When the jury must decide whether a promise has been made in order to support a finding of promissory estoppel, use this instruction with WPI 301A.01 (Promissory Estoppel).

COMMENT

The instruction is derived from sections 2(1) and 4 of the Restatement (Second) of Contracts (1981).

In contract law, the word "promise" is a term of art. Hansen v. Virginia Mason Med. Ctr., 113 Wn.App. 199, 207, 53 P.3d 60 (2002). The definition of a promise in the first Restatement of Contracts § 2(1) (1932), has been approved by Washington courts: "A promise is an undertaking, however expressed, either that something shall happen, or that something shall not happen, in the future." Hansen v. Virginia Mason Med. Ctr., 113 Wn.App. at 207; Meissner v. Simpson Timber Co., 69 Wn.2d 949, 957, 421 P.2d 674 (1966); Plumbing Shop, Inc. v. Pitts, 67 Wn.2d 514, 517, 408 P.2d 382 (1965).

The current edition of the Restatement provides: "A promise is a manifestation of intention to act or refrain from acting in a specified way, so made as to justify a promisee in understanding that a commitment has been made." Restatement (Second) of Contracts § 2(1) (1981), cited in Hansen v. Virginia Mason Med. Ctr., 113 Wn.App. at 207, and Havens v. C & D Plastics, Inc., 124 Wn.2d 158, 172, 876 P.2d 435 (1994). This emphasis on the justifiable understanding of the promisee is reflected in the wording of the instruction. The Restatement (Second) also provides, at section 4: "A promise may be stated in words either oral or written, or may be inferred wholly or partly from conduct."

A promise is distinguished from an intention to do a thing. Meissner v. Simpson Timber Co., 69 Wn.2d 949, 957, 421 P.2d 674 (1966). See

also Pacific Cascade Corp. v. Nimmer, 25 Wn.App. 552, 608 P.2d 266 (1980). A promise, in the sense of a commitment, is also to be distinguished from a description of a future event. Hansen v. Virginia Mason Med. Ctr., 113 Wn.App. at 207; Peoples Mortg. Co. v. Vista View Builders, 6 Wn.App. 744, 496 P.2d 354 (1972).

An "illusory promise" is "a purported promise that actually promises nothing because it leaves to the speaker the choice of performance or nonperformance." It is "neither enforceable nor sufficient consideration to support enforcement of a return promise." Interchange Associates v. Interchange, Inc., 16 Wn.App. 359, 360–61, 557 P.2d 357 (1976). This includes the reservation of an absolute right to cancel a promised performance. Interchange Associates v. Interchange, Inc., 16 Wn.App. at 360. Cf. Omni Group, Inc. v. Seattle-First Nat. Bank, 32 Wn.App. 22, 645 P.2d 727 (1982) (right to cancel on occurrence of specified condition does not render promise illusory).

A "supposed promise may be illusory because it is so indefinite that it cannot be enforced, or by reason of provisions contained in the promise which make its performance optional or entirely discretionary by the promisor." Goodpaster v. Pfizer, Inc., 35 Wn.App. 199, 203, 665 P.2d 414 (1983). Similarly, an agreement to negotiate a contract in the future "is nothing more than negotiations." Wharf Restaurant, Inc. v. Port of Seattle, 24 Wn.App. 601, 608, 605 P.2d 334 (1979).

Washington courts have analyzed contracts in which a promise is manifested by conduct as "implied contracts," or as contracts or contract terms "implied in fact." See Johnson v. Whitman, 1 Wn.App. 540, 463 P.2d 207 (1969) (distinguishing quasi contract, "implied in law," which is based on implied legal duties or obligations):

> A true implied contract, or contract implied in fact, is an agreement which depends for its existence on some act or conduct of the party sought to be charged, and arises by inference or implication from circumstances which, according to the ordinary course of dealing and the common understanding of men, show a mutual intention on the part of the parties to contract with each other.

Johnson v. Whitman, 1 Wn.App. at 544–45, quoting Ross v. Raymer, 32 Wn.2d 128, 137, 201 P.2d 129 (1948). See also Pierce County v. State, 144 Wn.App. 783, 185 P.3d 594 (2008). See WPI 301A.02 (Quasi Contract).

The existence of an implied contract is a question for the trier of fact. Lokan & Associates, Inc. v. American Beef Processing, LLC, 177 Wn.App. 490, 311 P.3d 1285 (2013); Weiss v. Lonnquist, 153 Wn.App. 502, 224 P.3d 787 (2009) (trial court properly inferred existence of subsequent employment contract). See also Kilthau v. Covelli, 17 Wn.App. 460, 462, 563 P.2d 1305 (1977). The courts also note, however,

that "the types of contract, express and implied, simply differ in the mode of proof and not in terms of their legal consequences." Plumbing Shop, Inc. v. Pitts, 67 Wn.2d at 517 n.1; Eaton v. Engelcke Mfg., Inc., 37 Wn.App. 677, 680, 681 P.2d 1312 (1984). Therefore, the instruction does not introduce the term "implied contract" to the jury.

[Current as of September 2018.]

WPI 301.03

MUTUAL ASSENT

In order for there to be mutual assent, the parties must agree on the essential terms of the contract, and must express to each other their agreement to the same essential terms.

NOTE ON USE

Use this instruction in combination with WPI 301.01 (Contract Defined), when the existence of a contract is at issue. Depending upon the issues in the case, the jury may need further instruction as to "essential terms" and their relationship to the parties' intention to form a contract.

In some cases, the instruction will need to be modified to set forth the particulars of offer and acceptance. See the Comment below.

COMMENT

Formation of a valid contract requires that the parties objectively express a mutual agreement as to the contract's material terms. See, e.g., Yakima County (West Valley) Fire Protection Dist. No. 12 v. City of Yakima, 122 Wn.2d 371, 388, 858 P.2d 245 (1993); Hansen v. Transworld Wireless TV-Spokane, Inc., 111 Wn.App. 361, 370, 44 P.3d 929 (2002). Mutual assent is required only as to the agreement's material terms:

> Almost never are all the connotations of a bargain exactly identical for both parties; it is enough that there is a core of common meaning sufficient to determine their performances with reasonable certainty or to give a reasonably certain basis for an appropriate legal remedy.

Trendwest Resorts, Inc. v. Ford, 103 Wn.App. 380, 388, 12 P.3d 613 (2000) (quoting comment b from Restatement (Second) of Contracts § 20 (1979)), reversed on other grounds at 146 Wn.2d 146, 43 P.2d 1223 (2002). For an overview of the issues involved in mutual assent, see DeWolf, Allen, and Caruso, 25 Washington Practice, Contract Law and Practice §§ 2:7 through 2:10 (3d ed.).

In most cases, the instruction will not need to be supplemented with more specific principles relating to offer and acceptance. Jurors do not usually need to focus on the legal details of offer and acceptance when deciding whether there has been an objectively expressed meeting

of the minds. For those cases in which these legal details would assist jurors in their deliberations, practitioners will need to draft additional instructions that are tailored to the issues involved in the particular case.

Jurors could be instructed with definitions of offer and acceptance and other applicable principles, such as the law relating to an offer's duration, an offer's withdrawal, an offer's rejection, methods of acceptance, and option contracts. These issues, although too numerous and fact-specific to be converted into generally applicable pattern instructions, are discussed in DeWolf, Allen, and Caruso, 25 Washington Practice, Contract Law and Practice §§ 2:11 through 2:22 (3d ed.).

[Current as of September 2018.]

WPI 301.04

CONSIDERATION

If you find (set forth the facts the court has determined would be sufficient to establish consideration), **then there was consideration.**

NOTE ON USE

This instruction is to be used in combination with WPI 301.01 (Contract Defined) when the issue of consideration presents a question of fact for jury determination.

The legal sufficiency of consideration will ordinarily be a question for the court. If the adequacy of consideration becomes an issue (see the Comment below), it will be a question for the trier of fact, and the instruction should be modified accordingly.

When it is asserted that promissory estoppel is an alternative to consideration, use WPI 301A.01 (Promissory Estoppel). See the Comment to WPI 301A.01 (Promissory Estoppel).

COMMENT

According to Washington courts, "[c]onsideration is any act, forbearance, creation, modification or destruction of a legal relationship, or return promise given in exchange." King v. Riveland, 125 Wn.2d 500, 505, 886 P.2d 160 (1994); Citizens for Des Moines, Inc. v. Petersen, 125 Wn.App. 760, 106 P.3d 290 (2005) (trial court erroneously found contract where no consideration was exchanged).

"[B]efore any act or promise or forbearance can constitute a consideration [for a promise], it must be bargained for and given in exchange for the promise." Williams Fruit Co. v. Hanover Ins. Co., 3 Wn.App. 276, 281, 474 P.2d 577 (1970). See Restatement (Second) of Contracts § 71(1) (1981). According to the Restatement, "[a] performance or return promise is bargained for if it is sought by the promisor in exchange for his promise and is given by the promisee in exchange for that promise." Restatement (Second) of Contracts § 71(2) (1981).

Generally, "whether a contract is supported by consideration is a question of law and may be properly determined by a court on summary judgment." Nationwide Mut. Fire Ins. Co. v. Watson, 120 Wn.2d 178, 195, 840 P.2d 851 (1992); Lokan & Associates, Inc. v. American Beef Processing, LLC., 177 Wn.App 490, 311 P.3d 1285 (2013). When the issue is not whether something is or is not consideration, but rather whether something alleged to be consideration did or did not occur or

exist, a jury question may be presented. See generally 75A Am.Jur.2d Trial § 797 (1991); 1 Federal Trial Handbook 3d Civil § 12:31.

Generally, courts will not inquire into the "adequacy" of consideration, as distinguished from its legal "sufficiency." Browning v. Johnson, 70 Wn.2d 145, 422 P.2d 314 (1967). " '[A]nything which fulfills the requirements of consideration will support a promise whatever may be the comparative value of the consideration, and of the thing promised.' " Browning v. Johnson, 70 Wn.2d. at 147, quoting 1 Williston, Contracts § 115.

For an extended discussion of Washington's case law on consideration, see DeWolf, Allen, and Caruso, 25 Washington Practice: Contract Law and Practice §§ 2:23 through 2:26 (3d ed.).

[Current as of September 2018.]

WPI 301.05

CONTRACT INTERPRETATION

A contract is to be interpreted to give effect to the intent of the parties at the time they entered the contract.

You are to take into consideration all the language used in the contract, giving to the words their ordinary meaning, unless the parties intended a different meaning.

You are to determine the intent of the contracting parties by viewing the contract as a whole, considering the subject matter and apparent purpose of the contract, all the facts and circumstances leading up to and surrounding the making of the contract, the subsequent acts and conduct of the parties to the contract, and the reasonableness of the respective interpretations offered by the parties.

NOTE ON USE

Use this instruction when the jury must decide the intended meaning of contract language.

COMMENT

The content of the instruction is derived from Berg v. Hudesman, 115 Wn.2d 657, 801 P.2d 222 (1990), and subsequent cases. For discussions of appellate applications of *Berg*, see Tegland, 5C Washington Practice, Evidence Law and Practice, Ch. 12, especially § 1200.13 (6th ed.) and DeWolf, Allen, and Caruso, 25 Washington Practice: Contract Law and Practice §§ 5:2, 5:5, 5:6 (3d ed.).

In *Berg*, Washington rejected the "plain meaning rule," which would exclude the use of extrinsic evidence to determine the meaning of language that was "plain and unambiguous on its face." The court instead adopted the "context rule," under which "[a]ny determination of meaning or ambiguity should only be made in the light of the relevant evidence of the situation and relations of the parties, the subject matter of the transaction, preliminary negotiations and statements made therein, usages of trade, and the course of dealing between the parties." Berg v. Hudesman, 115 Wn.2d at 667, quoting Restatement (Second) of Contracts § 212, comment b (1981). The court adopted the Restatement (Second) of Contracts § 212, which provides:

(1) The interpretation of an integrated agreement is directed to the meaning of the terms of the writing or writings in the light of the circumstances, in accordance with the rules stated in this Chapter.

(2) A question of interpretation of an integrated agreement is to be determined by the trier of fact if it depends on the credibility of extrinsic evidence or on a choice among reasonable inferences to be drawn from extrinsic evidence. Otherwise a question of interpretation of an integrated agreement is to be determined as a question of law.

Despite *Berg's* apparent emphasis on the underlying intent of the parties in the "context rule," the Supreme Court has subsequently reaffirmed that "Washington continues to follow the objective manifestation theory of contracts. Under this approach, we attempt to determine the parties' intent by focusing on the objective manifestations of the agreement, rather than on the unexpressed subjective intent of the parties." Hearst Communications, Inc. v. Seattle Times Co., 154 Wn.2d 493, 503, 115 P.3d 262, 267 (2005).

Extrinsic evidence "is admitted for the purpose of aiding in the interpretation of what is in [a written] instrument, and not for the purpose of showing intention independent of the instrument." Berg v. Hudesman, 115 Wn.2d at 669. The "relevant intention of a party is that manifested by him rather than any different undisclosed intention." Lynott v. National Union Fire Ins. Co. of Pittsburgh, Pa., 123 Wn.2d 678, 684, 871 P.2d 146 (1994), quoting the Restatement (Second) of Contracts § 212, comment a (1965). See also the related discussion of the parol evidence rule, Comment to WPI 301.06 (Parol Evidence).

The court in *Berg* went to some lengths to adopt a distinction made by A. Corbin, 3 Corbin on Contracts § 534 (1960), between contract "interpretation" and contract "construction." Berg v. Hudesman, 115 Wn.2d at 663. The former, according to the court, relates to the meanings given by persons to symbols of expression, while the latter is concerned with the "legal consequences" of contract terms. The court later clarified that the "special and specific rules of interpretation" governing insurance contracts, at least, "were not changed by the *Berg* holding." Lynott v. National Union Fire Ins. Co. of Pittsburgh, Pa., 123 Wn.2d 678, 683, 871 P.2d 146 (1994).

The Restatement (Second) of Contracts (1981) contains a number of comparable provisions of general contract application that are characterized by the Restatement (Second) as "[s]tandards of preference among reasonable meanings." Restatement (Second) of Contracts § 212, comment b, at 126. These include section 203, Standards of Preference in

Interpretation, described in the comment as not overriding the meaning of the parties. They also include, however, section 206 (Interpretation Against the Draftsman) and section 207 (Interpretation Favoring the Public), which are each described as rules of construction and of interpretation. Insofar as such rules are an aid to interpretation, they should be incorporated in this instruction as applicable.

When interpretation depends upon the use of extrinsic evidence, and more than one reasonable inference can be drawn from the extrinsic evidence, interpretation of the contract presents a question of fact, not law. SAS America, Inc. v. Inada, 71 Wn.App. 261, 266, 857 P.2d 1047 (1993). According to the Restatement (Second) of Contracts § 212, comment d (1981):

> Analytically, what meaning is attached to a word or other symbol by one or more people is a question of fact. But general usage as to the meaning of words in the English language is commonly a proper subject of judicial notice without the aid of evidence extrinsic to the writing.

[Current as of September 2018.]

WPI 301.06

PAROL EVIDENCE

If you find that all of the provisions of an agreement between (name of plaintiff) and (name of defendant) are contained in a single written document, and that the document was intended by the parties as their final agreement on the subjects addressed in it, then you may not consider evidence outside the written document to add to, subtract from, vary, or contradict that written document [unless you also find that terms were included in the document as the result of fraud or mutual mistake].

However, if you find that such written document was not intended to be a complete expression of all of the terms agreed upon by those parties, that is, that the document does not contain all of the terms of their agreement, then you may also consider evidence of the circumstances surrounding the making of the agreement to supply additional terms of the agreement between the parties, but only if they are not inconsistent with the provisions of the written document.

NOTE ON USE

Use this instruction with WPI 301.05 (Contract Interpretation) when there is a written contract and a factual issue exists as to whether the contract is integrated.

If there is a basis for a jury finding of an exception to this rule on the basis of fraud or mutual mistake, include the bracketed phrase and supplement the instruction with a clarifying instruction regarding the appropriate requirements and burdens of proof. See WPI Chapter 160 (Fraud). Regarding mutual mistake, see the Comment to WPI 301.08 (Enforceability—Mutual Mistake).

COMMENT

Overview. This instruction is used when a party alleges that the intent of a written contract is not what the opposing party claims it to be. In this context, "parol evidence" simply means oral testimony.

In broad outline, the purpose of the parol evidence rule is to imple-

ment the policy of enforcing written contracts, as written, preventing a party from later arguing that the written contract is not what the parties intended.

A dispute over the intent of a contract should not be confused with the issues presented when one party claims the parties executed a second contract intended to replace the first contract. When the issue is whether the first contract was replaced by a second contract, WPI 301.7 (Contract Modification) is used rather than WPI 301.06.

Preliminary determination that contract is integrated. The parol evidence rule does not apply until the court has determined that the written contract is integrated; i.e., that the contract expresses the final and complete agreement by the parties. This preliminary determination is summarized in Emrich v. Connell, 105 Wn.2d 551, 716 P.2d 863 (1986). In *Emrich*, the court said:

> [T]he parol evidence rule only applies to a writing intended by the parties as an "integration" of their agreement; *i.e.*, a writing intended as the final expression of the terms of the agreement. In making this preliminary determination of whether the parties intended the written document to be an integration of their agreement, which is a question of fact, the trial court must hear all relevant, extrinsic evidence, oral or written. If, after hearing all the evidence, the court determines that the writing is the final and complete expression of the parties' agreement—*i.e., completely integrated*—then the extrinsic evidence is disregarded.

Emrich v. Connell, 105 Wn.2d at 556.

When the evidence would support a jury finding that a set of written documents, rather than a single written document, constituted an integrated agreement, the instruction should be modified accordingly.

The parol evidence rule. The current parol evidence rule in Washington was summarized by the Supreme Court in Hollis v. Garwall, 137 Wn.2d 683, 695, 974 P.2d 836 (1999). In *Hollis*, the court said in a dispute arising out of a written contract, the parol evidence rule bars:

(1) Evidence of a party's unilateral or subjective intent as to the meaning of a contract word or term; and

(2) Evidence that would show an intention independent of the instrument; and

(3) Evidence that would vary, contradict or modify the written word.

Effect of Berg v. Hudesman. A 1990 case, Berg v. Hudesman, 115 Wn.2d 657, 801 P.2d 222 (1990), seemed to signal a departure from the general rules summarized above. The most controversial portion of *Berg* was a statement by the court that parol evidence is admissible to show the intent of the contract even if the contract is not ambiguous on its face.

Over the years, however, the courts, including the Supreme Court, have signaled disapproval of *Berg*, without ever overruling *Berg*. It is now safe to say that the controversial portions of *Berg* have been abandoned, and that the traditional rules summarized above continue to be controlling. Tegland, 5C Evidence Law and Practice, § 1200.13 (6th ed.).

Cross-references. The foregoing is only a brief summary of the substantive law underlying WPI 301.06. For a detailed analysis of the law, see DeWolf, Allen, and Caruso, 25 Washington Practice: Contract Law and Practice, Chapter 4 (3d ed.), and Tegland, 5C Washington Practice: Evidence Law and Practice, Chapter 12 (6th ed.).

[Current as of September 2018.]

WPI 301.07

CONTRACT MODIFICATION

Once a contract has been entered into, mutual assent of the contracting parties is essential for any modification of the contract.

To establish a modification, the party asserting the modification must show, through the [words] [or] [conduct] of the parties, that there was an agreement of the parties on all essential terms of the contract modification, and that the parties intended the new terms to alter the contract.

NOTE ON USE

Use this instruction when there is a jury issue of contract modification. If, under the circumstances, the court determines that consideration is required for a claimed contract modification, and that there is a factual issue regarding such consideration, this instruction should be modified accordingly. See the Comment below. It may also be necessary to use WPI 301.04 (Consideration), which incorporates the court's determination of what constitutes consideration.

Use the bracketed words as appropriate to the type of evidence of modification that is offered.

COMMENT

Overview. This instruction is used when a party alleges that an existing contract was later modified by the parties, and the evidence presented is sufficient to submit the issue to the jury.

A claim that a contract was later modified by the parties should not be confused with the issues presented when one or both of the parties acknowledge that only one contract exists, but the parties disagree about the intent of certain terms within the contract. When the issue is intent rather than modification, WPI 301.06 (Parol Evidence) is used rather than WPI 301.07.

Claim of modification, burden of proof. It is often said that "[m]utual modification of a contract by subsequent agreement arises out of the intentions of the parties and requires a meeting of the minds."

Ebling v. Gove's Cove, Inc., 34 Wn.App. 495, 499, 663 P.2d 132 (1983). See also Wagner v. Wagner, 95 Wn.2d 94, 621 P.2d 1279 (1980) (no modification of separation agreement); Tondevold v. Blaine Sch. Dist. No. 503, 91 Wn.2d 632, 590 P.2d 1268 (1979) (attempt by employer to reinstate contract provision deleted by mutual agreement was void and of no effect); and MacDonald v. Hayner, 43 Wn.App. 81, 715 P.2d 519 (1986) (promise to renegotiate payment for services did not constitute promise to modify payment).

According to older cases, an *oral* modification of a written contract must be shown by clear and convincing evidence. See Tonseth v. Serwold, 22 Wn.2d 629, 644, 157 P.2d 333 (1945); Dinsmore Sawmill Co. v. Falls City Lumber Co., 70 Wash. 42, 44, 126 P. 72 (1912); see generally 17B C.J.S. Contracts § 755 (1999). Modern authority from elsewhere is divided.

Some states continue to require clear and convincing evidence. See, e.g., Sokol & Associates, Inc. v. Techsonic Industries, Inc., 495 F.3d 605 (8th Cir. 2007) (under Minnesota law, a party asserting the parol modification of a written contract has the burden of proving the modification by clear and convincing evidence). Others require only a preponderance of the evidence to establish contract modification. See, e.g., Barrett v. Bank of America (1986), 183 Cal.App.3d 1362, 229 Cal.Rptr. 16 (trial court erred in requiring clear and convincing evidence).

Consideration. Generally, a modification requires consideration, or a mutual change in obligations and rights. Wagner v. Wagner, 95 Wn.2d 94, 621 P.2d 1279 (1980); Rosellini v. Banchero, 83 Wn.2d 268, 517 P.2d 955 (1974); Dragt v. Dragt/DeTray, LLC, 139 Wn.App. 560, 576, 161 P.3d 473 (2007); Ebling v. Gove's Cove, Inc., 34 Wn.App. 495, 499, 663 P.2d 132 (1983). While consideration may be "any bargained for act or forbearance," Dragt v. Dragt/DeTray, LLC, 139 Wn.App. at 572, it must be something separate from what was promised in the original contract; Dragt v. Dragt/DeTray, LLC, 139 Wn.App. 560 (trial court erred in enforcing contract modification where separate consideration was not shown).

Depending on the facts and which issues are disputed, it may be possible for counsel to argue that the agreement to a new contract replacing the old contract is, itself, sufficient consideration to support the formation of the new contract. DeWolf, Allen, and Caruso, 25 Washington Practice, Contract Law and Practice § 11.3 (3d ed.), and authorities cited therein.

Cross-reference. The foregoing is only a brief summary of the substantive law underlying WPI 301.07. For a detailed analysis of the law, see DeWolf, Allen, and Caruso, 25 Washington Practice, Contract Law and Practice, Chapter 11 (3d ed.).

Effect of parol evidence rule. As mentioned above, the parol evidence rule (see WPI 301.06) comes into play when one or both parties agree that only one contract exists, but the parties disagree on the intent of that contract. The parol evidence rule does not restrict proof that the parties later formed a new contract, even if the new contract is inconsistent with the first contract. DeWolf, Allen, and Caruso, 25 Washington Practice, Contract Law and Practice § 4.6 (3d ed.).

As a result, the parol evidence rule would normally not apply in a case in which the issue is whether the parties formed a new contract to replace a previous contract. The parol evidence rule would become applicable only if both parties agree that a new contract was formed, but disagree on the intent of certain terms in the new contract.

For a more detailed discussion of the parol evidence rule, see the Comment to WPI 301.06.

[Current as of September 2018.]

WPI 301.08

ENFORCEABILITY—MUTUAL MISTAKE

A party may rescind a contract on the ground of mutual mistake if the party proves by clear, cogent, and convincing evidence that

(1) both parties were independently mistaken as to a basic assumption regarding existing facts, upon which the party seeking to rescind relied in making the contract, and

(2) the mistake changed the bargain so much that the party seeking to rescind would not have entered into the contract if [he] [she] [it] had been aware of the mistake.

In addition, the party seeking to rescind a contract has the burden of proving by a preponderance of the evidence that [he] [she] [it] does not bear the risk of mistake. [This means that a party cannot rescind a contract on the ground of mutual mistake if [he] [she] [it] was aware, at the time the contract was made, that [he] [she] [it] had only limited knowledge of the facts but chose to treat that knowledge as sufficient] [(other factors bearing on the risk of mistake)].

NOTE ON USE

Use this instruction when mutual mistake is asserted as an affirmative defense to the enforcement of a contract. When rescission of a release is involved, see the Comment below.

This instruction does not apply when mutual mistake is used as the basis to reform a contract. Because reformation is an equitable remedy, no separate instruction is offered on mutual mistake as a basis for reformation.

Use the bracketed material in the instruction's final paragraph as necessary to address factors bearing on the risk of mistake.

Use this instruction with WPI 21.01 (Meaning of Burden of Proof—

Preponderance of the Evidence), and WPI 160.03 (Fraud—Burden of Proof—Combined with Preponderance of Evidence).

For a discussion of issues relating to independence of mistake, see the Comment below.

COMMENT

Background. The grounds for mutual mistake as a defense to the enforcement of the contract are the same as those for the remedy of rescission. As an equitable remedy, rescission would not ordinarily be presented for jury determination. On the other hand, mutual mistake may well be presented as a defense to a breach of contract action, and in this context of a case with both legal and equitable issues, the court may decide to present the question to the jury.

It should be noted that the requirements for mutual mistake that may form the basis of reformation of a contract are distinct from those that form the basis for an affirmative defense to the enforcement of a contract. See Comment to WPI 301.06 (Parol Evidence); see also Leonard v. Washington Emp., Inc., 77 Wn.2d 271, 461 P.2d 538 (1969).

Restatement. This instruction is based on the Restatement (Second) of Contracts § 152 (1981), and its comments, together with § 154(b), as well as Washington cases.

According to the Restatement (Second) of Contracts § 152(1):

> Where a mistake of both parties at the time a contract was made as to a basic assumption on which the contract was made has a material effect on the agreed exchange of performances, the contract is voidable by the adversely affected party unless he bears the risk of the mistake under the rule stated in § 154.

Under the Restatement (Second) analysis, a "mistake" is a "belief that is not in accord with the facts." Restatement (Second) of Contracts § 151 (1981). Simonson v. Fendell, 101 Wn.2d 88, 91, 675 P.2d 1218 (1984). The "erroneous belief must relate to the facts as they exist at the time of the making of the contract. A party's prediction or judgment as to events to occur in the future, even if erroneous, is not a 'mistake' as the word is used here." Restatement (Second) of Contracts § 151 (1981), comment a.

A "basic assumption on which both parties made the contract" is one that would not be within the ordinary risks related to uncertainty involved in typical business transactions. Thus an erroneous assumption about the stability of market conditions or the financial situation of either of the parties would not ordinarily be considered a "basic as-

sumption," but the erroneous assumption of the presence of timber or of a building on a parcel of land may be. Restatement (Second) of Contracts § 152, comment b, and illus. 1 and 5 (1981). See Pub. Util. Dist. No. 1 of Lewis County v. Washington Pub. Power Supply Sys., 104 Wn.2d 353, 362, 705 P.2d 1195 (1985).

Material effect on exchange. The mistake must have a material effect on the agreed exchange of performance such that the "resulting imbalance . . . is so severe that [the party seeking to rescind] cannot fairly be required to carry it out." Restatement (Second) of Contracts § 152 at comment c (1981). This does not need to rise to the level of unconscionability, however; ordinarily it will be sufficient to show that the exchange is not only less desirable to the party seeking to rescind the contract but also more advantageous to the other party. Restatement (Second) of Contracts § 152 at comment c (1981). See Simonson v. Fendell, 101 Wn.2d 88, 675 P.2d 1218 (1984) (materiality of mistake regarding profitability of business being sold).

Risk of mistake—Releases. A party bears the risk of mistake under section 154, and thus cannot avoid or rescind the contract, if the party is allocated the risk by the contract or, in the case more likely to arise for resolution by the trier of fact, when "he is aware, at the time the contract is made, that he has only limited knowledge with respect to the facts to which the mistake relates but treats his limited knowledge as sufficient . . . ." Restatement (Second) of Contracts § 154(b) (1981); Tiegs v. Boise Cascade Corp., 83 Wn.App. 411, 426, 922 P.2d 115 (1996).

This provision has been applied by Washington appellate courts to preclude rescission of a release executed by parties who were aware of their injuries, but not their extent, at the time of the release. It does not apply, however, to parties who were unaware that they were injured at all. Del Rosario v. Del Rosario, 152 Wn.2d 375, 382–84, 97 P.3d 11 (2004); Bennett v. Shinoda Floral, Inc., 108 Wn.2d 386, 395, 739 P.2d 648 (1987). See also Pub. Util. Dist. No. 1 of Lewis County v. Washington Pub. Power Supply Sys., 104 Wn.2d 353, 362, 705 P.2d 1195 (1985): "A party who incurs an obligation with limited knowledge, conscious disregard of surrounding circumstances and awareness of uncertainty must bear the consequences of its decision." But see Nevue v. Close, 123 Wn.2d 253, 255–56, 867 P.2d 635 (1994) (recognizing criticism of *Bennett*'s rationale).

Independence of mistake. Washington cases also require, in the case of rescission, that the mistake of both parties be made independently by each, i.e., not relying on information obtained from the other. See Finch v. Carlton, 84 Wn.2d 140, 142, 524 P.2d 898 (1974), discussing Beaver v. Harris' Estate, 67 Wn.2d 621, 409 P.2d 143 (1965); Nationwide Mut. Fire Ins. Co. v. Watson, 120 Wn.2d 178, 190, 840 P.2d 851 (1992) (releases, nature or extent of injuries suffered by releasors);

see also Simonson v. Fendell, 101 Wn.2d 88, 91, 675 P.2d 1218 (1984). Therefore the term "independently" is included in the instruction. For a case in which independence of mistake is a central issue, the instruction can be modified to explain this concept in more detail.

"Bona fide" mistakes—Releases. There is also discussion in older cases of a "bona fide mistake regarding material facts, without culpable negligence on the part of the person complaining . . . ." Davey v. Brownson, 3 Wn.App. 820, 823, 478 P.2d 258 (1970) (contract for sale of building, presence of termite structural damage). These approaches do not appear to find support in the Restatement (Second), but may be held applicable in similar factual situations. Similarly, specific rules for avoiding enforcement of a release, by a party unaware of his or her injuries, have been articulated by Washington courts. Del Rosario v. Del Rosario, 152 Wn.2d 375, 97 P.3d 11 (2004); Bennett v. Shinoda Floral, Inc., 108 Wn.2d at 393 n.2, citing Finch v. Carlton, 84 Wn.2d 140, 524 P.2d 898 (1974).

Burden of proof. Mutual mistake must be proved by clear, cogent, and convincing evidence. Denaxas v. Sandstone Court of Bellevue, L.L.C., 148 Wn.2d 654, 669, 63 P.3d 125 (2003); Nationwide Mut. Fire Ins. Co. v. Watson, 120 Wn.2d 178, 189, 840 P.2d 851 (1992); Mutual of Enumclaw Ins. Co. v. Day, 197 Wn.App. 47, 64, 387 P.3d 1084 (2016); Urban v. Mid-Century Ins., 79 Wn.App. 798, 804, 905 P.2d 404 (1995) (clear and convincing evidence).

[Current as of September 2018.]

WPI 301.09

ENFORCEABILITY—UNILATERAL MISTAKE

A party may rescind a contract on the ground of unilateral mistake if the party proves by clear, cogent, and convincing evidence that

(1) [he] [she] [it] was mistaken as to a basic assumption regarding existing facts, upon which [he] [she] [it] relied in making the contract,

(2) the mistake changed the bargain so much that the party seeking to rescind would not have entered into the contract if [he] [she] [it] had been aware of the mistake, and

(3) the other party knew or had reason to know of the mistake, or the other party's fault caused the mistake.

In addition, the party seeking to rescind a contract has the burden of proving by a preponderance of the evidence that [he] [she] [it] does not bear the risk of mistake. [A party bears the risk of mistake if [he] [she] [it] was aware at the time the contract was made that [he] [she] [it] had only limited knowledge of the facts but chose to treat that knowledge as sufficient] [(other factors bearing on the risk of mistake)**].**

NOTE ON USE

Use this instruction when a party seeks to avoid enforcement of the contract on the basis of unilateral mistake. Include the last sentence if its provisions form the basis for the claim. If the claim is that enforcement of the contract would be unconscionable, this would be a determination for the court as a matter of law.

Use this instruction with WPI 21.01 (Meaning of Burden of Proof—Preponderance of the Evidence) and WPI 160.03 (Fraud—Burden of Proof—Combined With Preponderance of the Evidence).

COMMENT

Background. The grounds for unilateral mistake as a defense to the enforcement of the contract are the same as those for the remedy of rescission. As an equitable remedy, rescission would not ordinarily be presented for jury determination. On the other hand, unilateral mistake may well be presented as a defense to a breach of contract action. In the context of a case with both legal and equitable issues, the court may decide to present the question to the jury.

For a discussion of the definition of mistake and the requirements for mutual mistake, see the Comment to WPI 301.08 (Enforceability—Mutual Mistake). See comment b, Restatement (Second) of Contracts § 153 (1981). Compare WPI 302.10 (Excuse of Performance—Frustration of Purpose).

Unilateral mistake has been recognized as a defense to a contract where the party asserting the defense can show that the other party either knew about the mistake or is charged with knowing of the mistake. Snap-on Tools Corp. v. Roberts, 35 Wn.App. 32, 35, 665 P.2d 417 (1983).

Unconscionability. The Restatement (Second) of Contracts § 153 (1981) also recognizes unconscionability as a basis for denying enforcement of a contract resulting from unilateral mistake. The "unconscionability" option has not been included in the instruction, because "whether particular facts render an agreement unconscionable is a question of law" for the court. Gill v. Waggoner, 65 Wn.App. 272, 828 P.2d 55 (1992). "An unconscionable contract is one which 'no man in his senses, not under delusion, would make . . . and which no fair and honest man would accept . . . .' " Gill v. Waggoner, 65 Wn.App. at 278, quoting Montgomery Ward & Co., Inc. v. Annuity Bd. of Southern Baptist Convention, 16 Wn.App. 439, 444, 556 P.2d 552 (1976).

Reason to know of mistake. Actual knowledge of the mistake is not required; the party seeking rescission or avoidance may show that "the other party to the contract knows of or is charged with knowledge of the mistake." Gill v. Waggoner, 65 Wn.App. at 276. See also Basin Paving, Inc. v. Port of Moses Lake, 48 Wn.App. 180, 737 P.2d 1312 (1987); Snap-On Tools Corp. v. Roberts, 35 Wn.App. 32, 35, 665 P.2d 417 (1983); Appleway Leasing, Inc. v. Tomlinson Dairy Farms, Inc., 22 Wn.App. 781, 591 P.2d 1220 (1979). The Restatement (Second) uses the phrase "reason to know," rather than "should know," because:

> "Should know" imports a duty to others to ascertain facts; [while] the words "reason to know" are used both when the actor has a duty to another and where he would not be acting adequately in the protection of his own interests were he not acting with reference to the facts which he has reason to know.

Restatement (Second) of Contracts § 19, comment b, referenced in § 153, comment e (1981).

Bids. In a series of cases involving relief from unilateral mistakes in the calculation of bids, either by avoiding forfeiture of a bid bond or enforcement of the contract itself, the courts have held that relief may be granted (a) if the bidder acted in good faith, (b) without gross negligence, (c) was reasonably prompt in giving notice of the error to the other party, and (d) will suffer substantial detriment, while the other party (e) has not changed position and will suffer no substantial hardship if the forfeiture is not exacted or the contract not enforced. Peter Kiewit Sons' Co. v. Washington State Dep't of Transp., 30 Wn.App. 424, 429, 635 P.2d 740 (1981); Town of LaConner v. American Const. Co., Inc., 21 Wn.App. 336, 585 P.2d 162 (1978).

Risk of mistake. Relief from a mistake is unavailable to one who bears the risk of mistake. Denaxas v. Sandstone Court of Bellevue, L.L.C., 148 Wn.2d 654, 63 P.3d 125 (2003). When the party seeking relief based on unilateral mistake had constructive knowledge of the true state of affairs, it is improper to treat the lack of knowledge as a "mistake" relieving that party from enforcement of the contract. Denaxas v. Sandstone Court of Bellevue, L.L.C., 148 Wn.2d at 672; see also Tiegs v. Boise Cascade Corp., 83 Wn.App. 411, 426, 922 P.2d 115 (1996) ("[a] party who is aware he has only limited knowledge of the facts but treats his limited knowledge as sufficient, bears the risk of mistake").

Reformation of contract. As an alternative to rescission of the contract, a party may seek reformation of the contract in order to conform the writing to the actual agreement of the parties. Denaxas v. Sandstone Court, 148 Wn.2d 654, 63 P.3d 125 (2003).

> A party to a contract is entitled to reformation of the contract based on one party's unilateral mistake only if the other party engaged in inequitable conduct. A party acts inequitably if it knowingly conceals a material fact from the other party and has a duty to disclose that knowledge to the other party.

Oliver v. Flow Intern. Corp., 137 Wn.App. 655, 664, 155 P.3d 140, 145 (2006). See also Washington Mut. Sav. Bank v. Hedreen, 125 Wn.2d 521, 526, 886 P.2d 1121 (1994).

Burden of proof. A party alleging unilateral mistake must meet the standard of clear, cogent, and convincing evidence. See Kaufmann v. Woodard, 24 Wn.2d 264, 269–70, 163 P.2d 606 (1945) (reformation of contract); Wilhelm v. Beyersdorf, 100 Wn.App. 836, 843, 999 P.2d 54 (2000) (reformation of contract); Cavanaugh v. Brewington, 3 Wn.App. 757, 758, 477 P.2d 644 (1970) (reformation of contract). This heightened

burden of proof appears to apply whether the party is seeking to reform a contract or avoid its enforcement. On the other hand, the party seeking avoidance or reformation of a contract need only show by a preponderance of the evidence that such party does not bear the risk of mistake.

[Current as of September 2018.]

WPI 301.10

ENFORCEABILITY—DURESS

A party may rescind a contract on the ground of duress if the party proves by clear, cogent, and convincing evidence that [he] [she] [it] agreed to the contract because of an improper threat by the other party that left no reasonable alternative.

A threat is improper if (select an appropriate phrase from the Comment below).

[A threat to exercise a legal right, made in good faith, is not improper.]

NOTE ON USE

Use this instruction when a party seeks to avoid enforcement of a contract on the basis of duress that does not involve physical force. If physical compulsion is claimed, see the Comment below.

If an issue of ratification by subsequent conduct is raised, or if duress is applied by a third party, the instruction should be modified accordingly. See the Comment below.

Include the last sentence, if applicable.

Use this instruction with WPI 160.03 (Fraud—Burden of Proof—Combined With Preponderance of Evidence).

COMMENT

Background. This instruction is based generally on the Restatement (Second) of Contracts §§ 175 and 176 (1981).

Threat versus physical compulsion. Duress and undue influence both involve improper pressure during the bargaining process, which may form the basis for the pressured party to rescind or avoid enforcement of the contract. Cf. WPI 301.11 (Enforceability—Undue Influence). In the extreme, and relatively rare, case of physical compulsion of the conduct expressing assent to the contract, no contract is formed. See Restatement (Second) of Contracts § 174 (1981). In the more common instance of compulsion resulting from an improper threat, duress will render a contract voidable by the victim. Restatement (Second) of Contracts § 175 (1981).

Improper threats. According to the Restatement (Second) of Contracts § 176(1) (1981), a threat is improper if:

(a) what is threatened is a crime or a tort, or the threat itself would be a crime or a tort if it resulted in obtaining property,

(b) what is threatened is a criminal prosecution,

(c) what is threatened is the use of civil process and the threat is made in bad faith, or

(d) the threat is a breach of the duty of good faith and fair dealing under a contract with the recipient.

A threat is also improper under section 176 (2) if the resulting exchange is not on fair terms and

(a) the threatened act would harm the recipient and would not significantly benefit the party making the threat,

(b) the effectiveness of the threat in inducing the manifestation of assent is significantly increased by prior unfair dealing by the party making the threat, or

(c) what is threatened is otherwise a use of power for illegitimate ends.

This list broadens the formulation of the first Restatement, in which the primary focus was on whether a wrongful act compelled assent "without volition" or without the victim "exercising free will and judgment." Restatement of Contracts § 492 (1932), as quoted in Pleuss v. City of Seattle, 8 Wn.App. 133, 137, 504 P.2d 1191 (1972). See, e.g., In re J.N., 123 Wn.App. 564, 95 P.3d 414 (2004) (adoption agreement was not a result of duress); In re Marriage of Wilson, 117 Wn.App. 40, 68 P.3d 1121 (2003) (trial court's rejection of duress was justified by evidence that parties were educated and represented by counsel); Matthews v. Wenatchee Heights Water Co., 92 Wn.App. 541, 963 P.2d 958 (1998) (reluctance or fear of financial embarrassment insufficient to establish duress).

As noted in comment b to section 175, the Restatement (Second) has substituted the concept of "no reasonable alternative" for the former emphasis on lack of free will or volition. While Washington courts have not so far explicitly adopted the newer approach, in the related area of "undue influence," the courts have followed the Restatement (Second) in abandoning an "overcoming the will" analysis. Gerimonte v. Case, 42 Wn.App. 611, 615, 712 P.2d 876 (1986).

Legal right exercised in good faith. Many Washington cases hold that a "mere threat to exercise a legal right made in good faith" does not constitute duress. Pleuss v. City of Seattle, 8 Wn.App. 133,137, 504 P.2d 1191 (1972). This includes a threat of litigation. Red-Samm Mining Co., Inc. v. Port of Seattle, 8 Wn.App. 610, 508 P.2d 175 (1973). Such a threat is made in good faith "if made in the honest belief that valid grounds exist to justify the action threatened." Pleuss v. City of Seattle, 8 Wn.App. at 137; see Doernbecher v. Mutual Life Ins. Co. of New York, 16 Wn.2d 64, 132 P.2d 751 (1943).

Economic duress. In cases applying the first Restatement of Contracts § 492, Washington courts have held that to prove economic duress, or "business compulsion," the threat must involve serious business loss in a situation so immediate as to render resolution in court impractical, and the victim must prove that both the immediate pressure and the underlying vulnerability of the victim to such pressure were attributable to the offending party. Nord v. Eastside Ass'n Ltd., 34 Wn.App. 796, 798, 664 P.2d 4 (1983); Barker v. Walter Hogan Enterprises, Inc., 23 Wn.App. 450, 453, 596 P.2d 1359 (1979). Fear of financial embarrassment is insufficient to establish duress. Matthews v. Wenatchee Heights Water Co., 92 Wn.App. 541, 554, 963 P.2d 958 (1998).

Third parties. The Restatement (Second) of Contracts § 175(2) (1981) provides that a contract may be voidable by a victim of duress applied by someone who is not a party to the transaction, but only if the other party to the transaction has not, in good faith and without reason to know of the duress, given value or materially relied on the contract.

Ratification. Because duress renders a contract merely voidable, rather than void, subsequent conduct of the victim that ratifies the contract renders it no longer voidable. Western Washington Cement Masons Health & Sec. Trust Funds v. Hillis Homes, Inc., 26 Wn.App. 224, 234, 612 P.2d 436 (1980).

Burden of proof. The burden of proof for a party seeking to rescind a contract due to duress is clear, cogent, and convincing evidence. In re J.N., 123 Wn.App. 564, 576–77, 95 P.3d 414 (2004).

[Current as of September 2018.]

WPI 301.11

ENFORCEABILITY—UNDUE INFLUENCE

A party may rescind a contract on the ground of undue influence if that party proves, by clear, cogent, and convincing evidence, that [he] [she] [it] was unfairly persuaded to enter the contract by a person who [either] dominated [or had a confidential relationship with] the party.

[A person is in a confidential relationship with a party when the party is justified in assuming that the person would not act against the party's welfare. Such relationships include _____ and _____.]

(Fill in these blanks with the most pertinent or analogous relationship from the Comment below.)

Unfair persuasion is any means that would seriously impair the free and competent exercise of the party's judgment. In determining whether the persuasion was unfair, you may take into account such factors as the unfairness of the contract, if any, the availability of independent advice, and the experience or susceptibility of the party persuaded.

NOTE ON USE

Use the instruction above when a party seeks to avoid enforcement of a contract on the basis of undue influence by the other party to the contract.

Use the bracketed portions relating to confidential relationship when that is the basis for the claim. For examples of confidential relationships, e.g., parent and child, physician and patient, see the Comment below. If the undue influence is exercised by a third party, see the Comment below and modify the instruction accordingly. If an issue of ratification by subsequent conduct is raised, the instruction should be modified accordingly. See the Comment to WPI 301.10 (Enforceability—Duress).

Use this instruction with WPI 160.03 (Fraud—Burden of Proof—Combined with Preponderance of Evidence).

COMMENT

Background. This instruction is based primarily on the Restatement (Second) of Contracts § 177 (1981), which provides:

> (1) Undue influence is unfair persuasion of a party who is under the domination of the person exercising the persuasion or who by virtue of the relation between them is justified in assuming that that person will not act in a manner inconsistent with his welfare.
>
> (2) If a party's manifestation of assent is induced by undue influence by the other party, the contract is voidable by the victim.
>
> (3) If a party's manifestation of assent is induced by one who is not a party to the transaction, the contract is voidable by the victim unless the other party to the transaction in good faith and without reason to know of the undue influence either gives value or relies materially on the transaction.

Section 177 is cited and relied upon in In re Estate of Jones, 170 Wn.App. 594, 606–07, 287 P.3d 610 (2012), and Gerimonte v. Case, 42 Wn.App. 611, 614, 712 P.2d 876 (1986).

Third parties. If the party exercising the undue influence was not a party to the contract, application of this section will require modification of the instruction to reflect the additional requirements of the Restatement (Second)'s section 177(3).

Confidential relationships. Application of undue influence principles first depends upon establishing a relationship in which the party seeking to block enforcement of the contract was either under the domination of another, or justifiably assumed that another would not act inconsistently with the party's welfare. According to comment (a) of the Restatement (Second) § 177, relationships that "often fall within the rule" include parent and child, husband and wife, clergyman and parishioner, and physician and patient. "In each case it is a question of fact whether the relation is such as to give undue weight to the other's attempts at persuasion." Restatement (Second) of Contracts § 177 (1981).

A "confidential relationship" has also been described as including those that historically have been considered fiduciary, such as trustee and beneficiary, principal and agent, partner and partner, attorney and client, as well as any relationship in which one party has "gained the confidence of the other and purports to act or advise with the other's

interest in mind." McCutcheon v. Brownfield, 2 Wn.App. 348, 356–57, 467 P.2d 868 (1970).

Unfair persuasion. According to comment b, Restatement (Second) of Contracts § 177 (1981), when the required domination or relationship is present:

> [the] degree of persuasion that is unfair depends on a variety of circumstances. The ultimate question is whether the result was produced by means that seriously impaired the free and competent exercise of judgment. Such factors as the unfairness of the resulting bargain, the unavailability of independent advice, and the susceptibility of the person persuaded are circumstances to be taken into account . . ., but they are not in themselves controlling.

Burden of proof. A number of cases hold that undue influence must be proved by clear, cogent, and convincing evidence. See e.g., Tecklenburg v. Washington Gas & Elec. Co., 40 Wn.2d 141, 143, 241 P.2d 1172 (1952); In re Estate of Jones, 170 Wn.App. 594, 603, 287 P.3d 610 (2012); Endicott v. Saul, 142 Wn.App. 899, 176 P.3d 560 (2008). On the other hand, in deciding motions for summary judgment, although courts "must view the evidence presented through the prism of the substantive evidentiary burden," Woody v. Stapp, 146 Wn.App. 16, 22, 189 P.3d 807, 810 (2008), it has been noted that the "existence of undue influence between persons in a confidential relationship is more readily inferred." Gerimonte v. Case, 42 Wn.App. 611, 616, 712 P.2d 876 (1986), citing Estate of Randmel v. Pounds, 38 Wn.App. 401, 685 P.2d 638 (1984) (standard not applicable to summary judgment) and McCutcheon v. Brownfield, 2 Wn.App. 348, 357, 467 P.2d 868 (1970) (inference).

[Current as of September 2018.]

CHAPTER 301A

EQUITABLE ALTERNATIVES—PROMISSORY ESTOPPEL AND QUASI CONTRACT

WPI 301A.01 Promissory Estoppel
WPI 301A.02 Quasi Contract

WPI 301A.01

PROMISSORY ESTOPPEL

Promissory estoppel means that a person will be prevented (estopped) from denying liability for breaching his or her promise, when another person reasonably relied upon that promise and justice requires that the promise be enforced.

The party asserting promissory estoppel has the burden of proving, by a preponderance of the evidence, each of the following:

(1) That (name of promisor) **made a promise [of] [to]** (specify promise claimed)**;**

(2) That (name of promisor) **should reasonably have expected that promise to cause** (name of promisee or claimant) **to change position [by** (specify action or forbearance)**];**

(3) That (name of promisee or claimant) **actually did change position; [and]**

(4) That when (name of promisee or claimant) **changed position, [he] [she] [it] was relying on the promise of** (name of promisor)**, and was justified in doing so [; and]**

[(5) That injustice can be avoided only if the promise is enforced].

NOTE ON USE

The WPI Committee believes that because of the equitable nature of promissory estoppel, the issue will generally be decided by the court. However, if the issue is submitted to the jury it will generally be appropriate to devise specific factual questions for the jury to accompany this instruction. Whether an estoppel results from the established facts will then be a question for determination by the court, based on the jury's factual determinations. See the Comment. This instruction is included for use at the discretion of the trial court.

Item 5 is included in the instruction for completeness, but the court may wish to reserve this issue separately, in which case the item should be omitted from the instruction.

For equitable estoppel as a defense to a claim of breach, use WPI 302.06 (Excuse of Performance—Estoppel).

If promissory estoppel is asserted as an alternative to a finding of contract based on consideration, the instruction should be modified to clarify the alternatives for the jury.

Use this instruction with WPI 21.01 (Meaning of Burden of Proof—Preponderance of the Evidence).

COMMENT

Role of the jury. The Washington State Supreme Court has not decided whether promissory estoppel is an appropriate issue to submit to a jury. However, in Kim v. Dean, 133 Wn.App. 338, 135 P.3d 978 (2006), the Court of Appeals analyzed this issue and held that there was no right to jury trial on a promissory estoppel claim based on the facts of the case before it. In *Kim*, the court found that a former employee had no right to a jury trial of his promissory estoppel action against a former employer over alleged promises that the employee would receive a portion of the proceeds when the employer's company was sold, because the claim was purely equitable notwithstanding the employee's request for money damages. The court reasoned that the claim was solely equitable because it was based on good faith reliance unsupported by consideration (historically an equitable cause of action) and because it did not present a quantifiable measure of damages but rather required the jury to balance the equities in arriving at a damage award.

In general, when an action is purely equitable in nature, there is no right to a jury trial, but where a case involves both legal and equitable

issues, a court has wide discretion to submit some, all, or none of the legal issues to a jury. Brown v. Safeway Stores, Inc., 94 Wn.2d 359, 617 P.2d 704 (1980). The history of the right to jury trial and the factors a court is to consider when determining whether the case is primarily equitable in nature or an action at law are discussed in two cases: Brown v. Safeway Stores, Inc., 94 Wn.2d at 368, and State ex rel. Dept. of Ecology v. Anderson, 94 Wn.2d 727, 620 P.2d 76 (1980). In making this determination, the court has great discretion, the exercise of which will not be disturbed except for clear abuse of discretion. Brown v. Safeway Stores, Inc., 94 Wn.2d at 368.

Several Washington appellate opinions have considered issues involving jury instructions on promissory estoppel without addressing the issue of whether they presented equitable issues not properly submitted to the jury. E.g., Wright v. Miller, 93 Wn.App. 189, 201, 963 P.2d 934 (1998) (insufficient evidence of unequivocal promise to submit to jury); Havens v. C & D Plastics, Inc., 68 Wn.App. 159, 842 P.2d 975 (1992) (insufficient evidence to submit to jury), reversed in part on other grounds at 124 Wn.2d 158, 876 P.2d 435 (1994); Farm Crop Energy, Inc. v. Old Nat. Bank of Washington, 38 Wn.App. 50, 685 P.2d 1097 (1984), reversed on other grounds at 109 Wn.2d 923, 750 P.2d 231 (1988) (Supreme Court noting that an instruction based on the Restatement (Second) of Contracts § 90(1) would have been "preferable" to the one used by the trial court). See also Clipse v. Commercial Driver Services, Inc., 189 Wn.App. 776, 795–97, 358 P.3d 464 (2015), review denied 185 Wn.2d 1017 (2016) (trial court improperly submitted promissory estoppel theory to jury when plaintiff failed to present evidence of a clear and definite promise giving rise to promissory estoppel).

An equitable issue may be submitted to a jury for resolution of factual questions, although its verdict will be advisory only unless both parties consent to be bound. State ex rel. Dept. of Ecology v. Anderson, 94 Wn.2d 727, 620 P.2d 76 (1980); Alpine Industries, Inc. v. Gohl, 30 Wn.App. 750, 637 P.2d 998 (1981). For example, in C & K Engineering Contractors v. Amber Steel Co. (1978) 23 Cal.3d 1, 587 P.2d 1136, 151 Cal.Rptr. 323, the trial court denied defendant's request for a jury trial but empaneled an advisory jury to consider the issue of plaintiff's reasonable reliance on defendant's promise.

Elements of promissory estoppel. With regard to element (5), "if justice can be avoided only by enforcement of the promise," the Restatement (Second) of Contracts § 90, comment b, notes that satisfaction of this requirement:

> may depend on the reasonableness of the promisee's reliance, on its definite and substantial character in relation to the remedy sought, on the formality with which the promise is made, on the extent to which the deterrent and channeling functions of form are met by the commercial setting or otherwise, and on the extent to which

such other policies as the enforcement of bargains and the prevention of unjust enrichment are relevant.

See R. S. Bennett & Co., Inc. v. Economy Mechanical Industries, Inc., 606 F.2d 182, 186 (7th Cir. 1979) (in summary judgment context, avoiding injustice a matter of law, while satisfaction of other elements a question of fact). Compare with Kaiser Steel Corp. v. Frank Coluccio Const. Co., 785 F.2d 656 (9th Cir. 1986) (upholding instruction requiring jury to determine whether injustice could be avoided only by an award of damages, when specific enforcement not possible).

The Restatement (Second) of Contracts § 90(1) (1981) provides:

> A promise which the promisor should reasonably expect to induce action or forbearance on the part of the promisee or a third person and which does induce such action or forbearance is binding if injustice can be avoided only by enforcement of the promise. The remedy created for breach may be limited as justice requires.

In analyzing the application of section 90, the Washington courts have established five requirements for recovery in promissory estoppel: "(1) a promise which (2) the promisor should reasonably expect to cause the promisee to change position and (3) which does cause the promisee to change position (4) justifiably relying on the promise, in such a manner that (5) injustice can be avoided only by enforcement of the promise." King v. Riveland, 125 Wn.2d 500, 506, 886 P.2d 160 (1994); see also Corbit v. J. I. Case Co., 70 Wn.2d 522, 538, 424 P.2d 290 (1967); Shaw v. Housing Auth. of City of Walla Walla, 75 Wn.App. 755, 761, 880 P.2d 1006 (1994).

Promissory estoppel makes "a promise binding, under certain circumstances, without consideration in the usual sense of something bargained for and given in exchange. If the promisee's performance was requested at the time the promisor made his promise and that performance was bargained for, the doctrine is inapplicable." Greaves v. Medical Imaging Systems, Inc., 124 Wn.2d 389, 398, 879 P.2d 276 (1994), quoting Klinke v. Famous Recipe Fried Chicken, Inc., 94 Wn.2d 255, 261 n.4, 616 P.2d 644 (1980) (citations omitted).

The Washington Supreme Court has also noted that promissory estoppel is similar to estoppel by silence in that "in either case the party who is estopped has in effect stood by and, in violation of his duty in equity and good conscience to warn another of the real facts, permitted the latter to take some action detrimental to his own interest." In such an instance, it is "not necessary that the one estopped receive some benefit or consideration from the particular transaction," nor is it necessary that he be "guilty of some actual overt act of fraud." Central Heat, Inc. v. Daily Olympian, Inc., 74 Wn.2d 126, 133, 443 P.2d 544 (1968).

There can be no promissory estoppel in the absence of a promise. Corbit v. J. I. Case Co., 70 Wn.2d 522, 538, 424 P.2d 290 (1967). See WPI 301.02 (Promise Defined). There is also no promissory estoppel without evidence of reliance. Shaw v. Housing Auth. of City of Walla Walla, 75 Wn.App. 755, 880 P.2d 1006 (1994). On the other hand, neither consideration for the promise, nor mutual assent, is required. Havens v. C & D Plastics, Inc., 124 Wn.2d 158, 173, 876 P.2d 435 (1994).

Damages. A number of courts have limited juries to an award of reliance damages upon a finding of promissory estoppel. E.g., Green v. Interstate United Management Services Corp., 748 F.2d 827 (3d Cir. 1984); RCM Supply Co. Inc. v. Hunter Douglas, Inc., 686 F.2d 1074 (4th Cir. 1982). The Washington Supreme Court considered the issue without resolving it in Farm Crop Energy, Inc. v. Old Nat. Bank of Washington, 109 Wn.2d 923, 750 P.2d 231 (1988) (plaintiff limited to reliance damages on basis of "new business rule").

Additional or alternative claims. A promisee may bring a claim for breach of contract and, in addition or in the alternative, for promissory estoppel. Farm Crop Energy, Inc. v. Old Nat. Bank of Washington, 109 Wn.2d 923, 750 P.2d 231 (1988). See also Flower v. T.R.A. Industries, Inc., 127 Wn.App. 13, 30–32, 111 P.3d 1192 (2005) (reversing the trial court's award of summary judgment for an employer and remanding for trial, holding that the plaintiff employee had successfully raised issues of fact about whether a contract for good cause discharge had been formed and that in the alternative plaintiff employee was entitled to pursue a claim for damages based on promissory estoppel if the contract could not be proved). To recover based on promissory estoppel in the context of what would otherwise be an employment at will, the employee must show that a promise of discharge only upon just cause was "clear and definite," as well as one that the employer promisor would reasonably expect to cause the employee promisee to change position in reliance upon the promise. Havens v. C & D Plastics, Inc., 124 Wn.2d at 173–74.

Employee handbook cases. In the context of claims based upon breach of promises contained in employee handbook cases, a claim for breach of a promise of specific treatment was recognized in Thompson v. St. Regis Paper Co., 102 Wn.2d 219, 230, 685 P.2d 1081, 1088 (1984):

> Therefore, we hold that if an employer, for whatever reason, creates an atmosphere of job security and fair treatment with promises of *specific treatment in specific situations* and an employee is induced thereby to remain on the job and not actively seek other employment, those promises are enforceable components of the employment relationship.

(Emphasis in original.) But see Bulman v. Safeway, Inc., 144 Wn.2d 335, 27 P.3d 1172 (2001) (holding that an employee must prove reliance

on a particular promise of specific treatment and not on a general atmosphere of job security).

The *Thompson* specific treatment claim "is not an implied or express contract claim, but is independent of a contractual analysis and instead rests on a justifiable reliance theory." Korslund v. Dyncorp Tri-Cities Services, Inc., 156 Wn.2d 168, 185, 125 P.3d 119 (2005) (citations omitted). See also Worley v. Providence Physician Servs. Co., 175 Wn.App. 566, 307 P.3d 759 (2013) (trial court properly dismissed wrongful discharge claim brought by nurse practitioner who failed to establish either a promise of specific treatment or a violation of public policy).

While this type of claim is often based upon a written promise, there is no requirement of a writing; *Thompson* specifically incorporates the Restatement definition of a "promise," which includes both written and oral promises. Thompson v. St. Regis Paper Co., 102 Wn.2d at 230 (citing Restatement (Second) of Contracts § 2 (1981)). "A promise is a manifestation of intention to act or refrain from acting in a specified way, so made as to justify a promisee in understanding that a commitment has been made." Restatement (Second) of Contracts § 2(1). "The word 'promise' is commonly and quite properly also used to refer to the complex of human relations which results from the promisor's words or acts of assurance." Restatement (Second) of Contracts § 2 comment a. Furthermore, the doctrine of justifiable reliance extends to oral promises, and the relevant Restatement provision provides several examples of enforceable oral promises. See Restatement (Second) of Contracts § 90, illus. 7, 16, and 17 (1981).

Third party. Regarding a potential claim by a third party, as opposed to a promisee, see Restatement (Second) of Contracts § 90, comment c (1981), which explains: "If a promise is made to one party for the benefit of another, it is often foreseeable that the beneficiary will rely on the promise."

Statute of frauds. The Washington Supreme Court has declined to adopt the Restatement (Second) of Contracts § 139 (1981), which applies the doctrine of promissory estoppel generally to enforce an oral promise not in compliance with the statute of frauds or RCW 19.36.010 (setting forth categories of contracts that are void if not written). Greaves v. Medical Imaging Systems, Inc., 124 Wn.2d 389, 879 P.2d 276 (1994). On the other hand, the court has held that when there is detrimental reliance, promissory estoppel may be used to enforce a contract in spite of the statute of frauds against a "party who promises, implicitly or explicitly, to make a memorandum of a contract in order to satisfy the statute of frauds, and then breaks that promise." Klinke v. Famous Recipe Fried Chicken, Inc., 94 Wn.2d 255, 259, 616 P.2d 644 (1980) quoting In re Estate of Nelson, 85 Wn.2d 602, 537 P.2d 765 (1975), and citing Restatement (Second) of Contracts § 178, comment f (1981).

For a detailed discussion of promissory estoppel issues, see DeWolf, Allen, and Caruso, 25 Washington Practice, Contract Law and Practice, Ch. 6 (3d ed.).

[Current as of September 2018.]

WPI 301A.02

QUASI CONTRACT

[If you find that there is no enforceable contract between the parties,] you shall award (name of plaintiff) **the reasonable value of the [services performed] [work, labor, or property furnished] if** (name of plaintiff) **has proved by a preponderance of the evidence that**

(1) (name of plaintiff) **[performed the services] [furnished work, labor, or property] to** (name of defendant's) **benefit and with** (name of defendant's) knowledge **, and**

(2) under the circumstances, (name of defendant) **either knew or should have known that the [services were performed] [work, labor, or property were furnished] and received with the expectation of payment of reasonable value.**

NOTE ON USE

If plaintiff has combined a quasi contract claim with a contract claim, include the first bracketed phrase. Combine this instruction with WPI 303.08 (Damages—Restitution), as appropriate.

Use this instruction with WPI 21.01 (Meaning of Burden of Proof—Preponderance of the Evidence).

COMMENT

Nature of quasi contract claim. A quasi contract is also called a contract implied in law. It is not, however, based on contract at all. Instead it "arises from an implied duty of the parties," not based on consent or agreement but on equitable principles calling for the prevention of unjust enrichment. Heaton v. Imus, 93 Wn.2d 249, 252, 608 P.2d 631 (1980); Granville Condominium Homeowners Ass'n v. Kuehner, 177 Wn.App. 543, 312 P.3d 702 (2013) (court held against condominium association finding tenant-at-will could not be held liable for owner's delinquent assessments).

In fact, a party to a valid express contract may not bring an action on a quasi (implied in law) contract related to the same subject matter. Chandler v. Washington Toll Bridge Authority, 17 Wn.2d 591, 604, 137

P.2d 97 (1943); Pierce County v. State, 144 Wn.App. 783, 185 P.3d 594 (2008) (trial court properly found implied contract in addition to express contract because express contract did not address responsibility to provide long-term care). Recovery in quasi contract is appropriate when money, property, or some other form of benefit is placed in one person's possession under such circumstances that "in equity and good conscience that person ought not to retain it." Family Medical Bldg., Inc. v. Dept. of Social & Health Servs., 37 Wn.App. 662, 669–70, 684 P.2d 77 (1984), affirmed in part and reversed in part 104 Wn.2d 105, 702 P.2d 459 (1985).

Right to a jury. The state constitution protects the right to a jury trial in purely legal actions but not in purely equitable actions. Const. Art. I, § 21; Auburn Mechanical, Inc., v. Lydig Constr., Inc., 89 Wn.App. 893, 897, 951 P.2d 311 (1998). Many quasi contract claims have both equitable and legal aspects; these claims are based on equitable principles, but they usually seek the legal remedy of monetary damages (as opposed to the more traditional equitable remedies of injunction, specific performance, or constructive trust). Auburn Mechanical, Inc., v. Lydig Constr., Inc., 89 Wn.App. at 901–02.

The Court of Appeals has held that whether a quasi contract action is a legal action depends on the nature of the requested relief. A quasi contract claim that seeks only monetary damages is a legal claim triggering the right to a jury trial. See Auburn Mechanical, Inc., v. Lydig Constr., Inc., 89 Wn.App. at 905. When a plaintiff seeks both damages and a more traditional equitable remedy, the court will need to balance several factors in determining whether the action is primarily legal or equitable. See Auburn Mechanical, Inc., v. Lydig Constr., Inc., 89 Wn.App. at 898, 905.

Elements. The doctrine requires a showing "that not only was the party sought to be held enriched, but the enrichment must be unjust." Chandler v. Wash. Toll Bridge Auth., 17 Wn.2d 591, 603, 137 P.2d 97 (1943). As to the first point, the plaintiff must establish that the defendant received a "benefit," broadly defined.

> A person confers a benefit upon another if he gives to the other possession of or some other interest in money, land, chattels, or choses in action, performs services beneficial to or at the request of the other, satisfies a debt or a duty of the other, or in any way adds to the other's security or advantage. He confers a benefit not only where he adds to the property of another, but where he saves the other from expense or loss. The word "benefit," therefore, denotes any form of advantage.

Chandler v. Wash. Toll Bridge Auth., 17 Wn.2d at 602, quoting from the Restatement (First) of Restitution § 1(b) (1937).

The "mere fact that a person benefits another is not of itself sufficient" to require the other to make restitution, however. Chandler v. Wash.Toll Bridge Auth., 17 Wn.2d at 601. It must also be demonstrated that the enrichment, or retention of the benefit, is "unjust."

When a person performs services or confers a benefit "unconditionally," that person will not be entitled to restitution except "where the benefit was conferred under circumstances making such action necessary for the protection of the interests of the other or of third persons." Even if an "emergency" exception applies, however, it must appear that the service was performed with the intent to ask for remuneration. Chandler v. Wash. Toll Bridge Auth., 17 Wn.2d 591, 603, 137 P.2d 97 (1943).

In addition, the benefits must have been purposely rendered to the defendant. A plaintiff cannot recover in quasi contract when he performed services under a contract with a third party, and the benefits to the defendant were "purely incidental." Chandler v. Wash. Toll Bridge Auth., 17 Wn.2d at 604.

Remedy. The basic remedy for a successful claim in quasi contract (i.e., a contract implied in law) is unjust enrichment. Young v. Young, 164 Wn.2d 477, 483–86, 191 P.3d 1258 (2008) (distinguishing the remedy of unjust enrichment from that of quantum meruit, with the former applying to contracts implied in law and the latter to contracts implied in fact). The *Young* court rejected previous opinions that had imprecisely indicated that the remedy for contracts implied in law is quantum meruit, see, e.g., Heaton v. Imus, 93 Wn.2d 249, 252, 608 P.2d 631 (1980); Auburn Mechanical, Inc., v. Lydig Constr., Inc., 89 Wn.App. 893, 904, 951 P.2d 311 (1998). See DeWolf, Allen, and Caruso, 25 Washington Practice: Contract Law and Practice § 1:9 (3rd ed.) and the Comment to WPI 303.08 (Contract—Damages—Restitution).

[Current as of September 2018.]

CHAPTER 302

CONTRACTS—PERFORMANCE AND BREACH

WPI 302.01 Breach of Contract—Non-Performance of Duty
WPI 302.02 Conditions Precedent or Conditions Concurrent
WPI 302.03 Material Breach—Definition
WPI 302.04 Excuse of Performance—Anticipatory Breach
WPI 302.05 Elements of Equitable Estoppel
WPI 302.06 Excuse of Performance—Estoppel
WPI 302.07 Excuse of Performance—Waiver
WPI 302.08 Excuse of Performance—Interference With Contractual Performance
WPI 302.09 Excuse of Performance—Impossibility or Impracticability
WPI 302.10 Excuse of Performance—Frustration of Purpose
WPI 302.11 Implied Duty of Good Faith and Fair Dealing

WPI 302.01

BREACH OF CONTRACT—NON-PERFORMANCE OF DUTY

The failure to perform fully a contractual duty when it is due is a breach of contract.

NOTE ON USE

Add to this instruction an explanation of the particular contractual duty at issue and the factors affecting when the performance is due, according to the facts of the case. See the Comment below.

When the remedy sought or the circumstances require that the breach be material, use WPI 302.03 (Material Breach) with this instruction.

COMMENT

This instruction is based on Restatement (Second) of Contracts § 235(2) (1981): "When performance of a duty under a contract is due

any non-performance is a breach." According to explanatory comment b, when performance is due:

> Anything short of full performance is a breach, even if the party who does not fully perform was not at fault and even if the defect in his performance was not substantial . . . Non-performance includes defective performance as well as an absence of performance.

A great many factors may affect whether performance is "due," including the passage of a period of time, the occurrence of a condition precedent, or the discharge of a duty by performance or a change of circumstances. Restatement (Second) of Contracts, § 235(2) (1981). See, e.g., WPI 302.04 (Excuse of Performance—Anticipatory Breach), WPI 302.06 (Excuse of Performance—Estoppel), WPI 302.07 (Excuse of Performance—Waiver), WPI 302.08 (Excuse of Performance—Interference With Contractual Performance), WPI 302.09 (Excuse of Performance—Impossibility or Impracticability), and WPI 302.10 (Excuse of Performance—Frustration of Purpose).

When the contract does not specify to the contrary, performances that can be rendered simultaneously are due simultaneously. Restatement (Second) of Contracts § 234 (1981).

For further discussion of material breaches of contract, see the Comments to WPI 302.03 (Material Breach—Definition) and WPI 300.02 (Burden of Proof on the Issues—Breach of Contract—No Affirmative Defense).

[Current as of September 2018.]

WPI 302.02

CONDITIONS PRECEDENT OR CONDITIONS CONCURRENT

A party seeking to enforce the terms of a contract, or to recover damages for the breach of a contract, has the burden of proving that all conditions precedent or conditions concurrent to the other party's duty to perform under the contract have been fulfilled or that such fulfillment was excused.

(Name of party) **claims that the following condition[s] [precedent] [and] [concurrent] were not timely fulfilled:**

(State here the alleged condition precedent or concurrent to the party's obligation to perform that the party claims was not fulfilled.)

In order to recover, (name of party) **has the burden of proving, by a preponderance of the evidence, that all conditions [precedent] [and] [concurrent] were fulfilled or that fulfillment of such conditions was excused. [A condition is considered fulfilled if there is substantial performance. Substantial performance means performance in good faith and in compliance with the contract, except for minor and relatively unimportant deviations.]**

NOTE ON USE

Use this instruction when the court has determined that the enforcing party's performance is a condition precedent or concurrent to the other party's obligations under the contract, or when there is any other condition precedent or concurrent to the non-enforcing party's obligation to perform.

If the non-enforcing party asserts that the enforcing party failed to fulfill a condition concurrent by being in material breach of the contract, combine this instruction with WPI 302.03 (Material Breach—Definition).

Use this instruction with WPI 21.01 (Meaning of Burden of Proof—Preponderance of the Evidence).

If the party seeking enforcement of the contract alleges that its duty of performance was excused by the anticipatory breach of the other party, combine this instruction with WPI 302.04 (Excuse of Performance—Anticipatory Breach). If the party seeking enforcement alleges that its duty of performance was otherwise excused, see WPI 302.06 (Excuse of Performance—Estoppel) and instructions following.

Use the bracketed sentences if the condition is claimed to have been satisfied by substantial performance.

COMMENT

Introduction. Conditions precedent may be express, implied in fact, or constructive. Colorado Structures, Inc. v. Insurance Co. of the West, 161 Wn.2d 577, 167 P.3d 1125 (2007) (general contractor brought action against surety to recover on subcontractor's performance bond); Ross v. Harding, 64 Wn.2d 231, 236, 391 P.2d 526 (1964), citing 5 Williston, Contracts § 668, at 152 (3d ed.), and 3A Corbin, Contracts §§ 631, 632, at 21–22.

> "Conditions precedent" are those facts and events, occurring subsequently to the making of a valid contract, that must exist or occur before there is a right to immediate performance, before there is a breach of contract duty, before the usual judicial remedies are available. 3A Corbin, Contracts § 628, p. 16, Partlow v. Mathews, 43 Wn.2d 398, 261 P.2d 394 [1953]. A breach of a "promise" subjects the promisor to liability in damages, but does not necessarily excuse performance on the other side. Nonperformance or nonoccurrence of a "condition" prevents the promisee from acquiring a right, or deprives him of one, but subjects him to no liability. 5 Williston, Contracts (3d ed.) § 665, p. 132.

Ross v. Harding, 64 Wn.2d at 236.

With regard to an express condition precedent set forth in the contract, "[a]ny words which express, when properly interpreted, the idea that the performance of a promise is dependent on some other event will create a condition. Phrases and words such as 'on condition,' 'provided that,' 'so that,' 'when,' 'while,' 'after,' or 'as soon as' are often used." Ross v. Harding, 64 Wn.2d at 237. See also Walter Implement, Inc. v. Focht, 107 Wn.2d 553, 730 P.2d 1340 (1987).

Burden of proof. "The party seeking enforcement of the contract has the burden of proving performance of an express condition precedent." Walter Implement, Inc. v. Focht, 107 Wn.2d at 557. As the Supreme Court stated in Ross v. Harding:

Proof of performance of an express condition precedent is a burden

> which must be met by the party who seeks enforcement of the contract. . . . "A plaintiff, in order to maintain an action on the contract, must have complied with the conditions precedent contained therein. That is to say, a breach by a plaintiff of a material condition precedent relieves a defendant of liability under a contract."

Ross v. Harding, 64 Wn.2d at 240–41, quoting Atkinson v. Thrift Super Markets, Inc., 56 Wn.2d 593, 594, 354 P.2d 709 (1960). See also State v. Trask, 91 Wn.App. 253, 273–74, 957 P.2d 781 (1998) (a breach by one party does not necessarily excuse the other party from performing under the contract; the issue depends on whether the parties intended the first party's performance to be a condition precedent).

When a party wrongfully repudiates or rescinds a contract, the other party's performance of a condition precedent is excused unless it is proved that the condition precedent would not have been satisfied. The burden of proving this proposition is on the repudiating party. Puget Sound Service Corp. v. Bush, 45 Wn.App. 312, 319, 724 P.2d 1127 (1986).

Discharge of duties. When a condition precedent is neither performed within the time allowed by the contract nor excused, both parties' contractual duties are discharged. CHG Intern., Inc. v. Robin Lee, Inc., 35 Wn.App. 512, 515, 667 P.2d 1127 (1983).

> Since an express condition is a contract term and part of the bargain, literal operation of the condition is normally to be anticipated. The promisee bought a qualified right. He can expect excuse of the condition and relief from his bargain only if the promisor wrongfully interferes with satisfaction of the condition, or waives it, or if the condition is not of importance to the promisor and denial of relief for the promisee would occasion him a serious forfeiture.

Shattuck, Contracts in Washington: 1937–1957: Part III, 34 Wash. L. Rev. 467, 469 (1959). See also Hadaller v. Port of Chehalis, 97 Wn.App. 750, 757, 986 P.2d 836 (1999) (nonoccurrence of a condition precedent excuses the promisee's performance).

Substantial performance. "The doctrine of substantial performance is applied in rare instances where only 'minor and relatively unimportant deviations' remain to accomplish full contractual performance." Taylor v. Shigaki, 84 Wn.App. 723, 729, 930 P.2d 340 (1997), quoting 17A Am.Jur.2d Contracts § 634 (1991). See also DeWolf, Allen, and Caruso, 25 Washington Practice, Contract Law and Practice § 10:6 (3d ed.).

The substantial performance doctrine applies to all bilateral

contracts for an agreed exchange of performances except for contracts for the sale of goods. The UCC's "perfect tender rule" applies to the latter. See Kunsch, 1A Washington Practice: Methods of Practice, Ch. 36 (4th ed.). Moreover, while substantial performance triggers the duty of the other party to perform its part of the contract, it does not deprive that party of the right to recover damages for the discrepancy between substantial performance and what was promised in the contract. Fuller v. Rosinski, 79 Wn.2d 719, 723, 488 P.2d 1061 (1971).

Conditions concurrent. When the duties of two parties are to be performed simultaneously, as with the exchange of money for property, "[t]he promise of each is conditional upon a tender of performance by the other." DeWolf, Allen, and Caruso, 25 Washington Practice: Contract Law and Practice § 8:4 (3d ed.). "If a contract requires performance by both parties, the party claiming nonperformance of the other must first establish as a matter of fact the party's own performance." Willener v. Sweeting, 107 Wn.2d 388, 392, 730 P.2d 45 (1986).

In a contract for the sale of land, for example, the payment of the purchase price and the delivery of the deed are typically concurrent conditions, and the vendor "may not put the buyer in default until the vendor has offered to perform." Wallace Real Estate Inv., Inc. v. Groves, 124 Wn.2d 881, 887, 881 P.2d 1010 (1994). In such cases, "[a]n actual tender of performance may be excused when there is a willingness and an ability to perform, and actual performance has been prevented or expressly waived by the party to whom performance is due." Kane v. Borthwick, 50 Wash. 8, 12, 96 P. 516, 518 (1908), quoted in Carlson v. Leonardo Truck Lines, Inc., 13 Wn.App. 795, 538 P.2d 130 (1975) (holding plaintiff not entitled to sue repudiating seller for breach of contract when plaintiff failed to meet burden of proving it could have obtained the amount required for payment on the date fixed for performance).

Implied conditions may arise, for example, when no time is set in the contract for payment and delivery, and concurrent conditions are presumed to have been intended. See Meeker v. Johnson, 3 Wash. 247, 259, 28 P. 542 (1891). See more generally Restatement (Second) of Contracts § 234(1) (1981) (performances that can be performed simultaneously are due simultaneously unless the contract or circumstances indicate to the contrary).

Instruction format. The format of the instruction, calling for a specific condition alleged not to have been fulfilled, is suggested by the rules of pleading: "In pleading the performance or occurrence of conditions precedent, it is sufficient to aver generally that all conditions precedent have been performed or have occurred. A denial of performance or occurrence shall be made specifically and with particularity." CR 9(c).

For further discussion of the issues underlying this instruction, see

the Comment to WPI 300.02 (Burden of Proof on the Issues—Breach of Contract—No Affirmative Defense) and DeWolf, Allen, and Caruso, 25 Washington Practice, Contract Law and Practice §§ 8:3, 8:4, and 8:7 (3d ed.).

[Current as of September 2018.]

WPI 302.03

MATERIAL BREACH—DEFINITION

A "material breach" is a breach that is serious enough to justify the other party in abandoning the contract. A "material breach" is one that substantially defeats the purpose of the contract, or relates to an essential element of the contract, and deprives the injured party of a benefit that he or she reasonably expected.

NOTE ON USE

Use this instruction when one party seeks to avoid enforcement of a contract on the basis of a material breach by the other party and it is appropriate for the jury to determine whether a breach is material. Depending upon the circumstances of the case, it may be appropriate to add language from the provisions of the Restatement (Second) of Contracts § 241 (1981), set forth in the Comment below.

COMMENT

The instruction is cited as authoritative in Park Avenue Condo. Owners Ass'n. v. Buchan Devel. L.L.C., 117 Wn.App. 369, 71 P.3d 692 (2003).

"A breach or non-performance of a promise by one party to a bilateral contract, so material as to justify a refusal of the other party to perform a contractual duty, discharges that duty." Jacks v. Blazer, 39 Wn.2d 277, 285, 235 P.2d 187 (1951).

A material breach sufficient to allow rescission of a contract is one that "substantially defeats the purpose of the contract." Mitchell v. Straith, 40 Wn.App. 405, 410, 698 P.2d 609 (1985). See also Top Line Builders, Inc. v. Bovenkamp, 179 Wn.App. 794, 808, 320 P.3d 130 (2014).

The materiality of a breach is a question of fact. Bailie Communications, Ltd. v. Trend Business Systems, 53 Wn.App. 77, 82, 765 P.2d 339 (1988). The question of materiality depends on the circumstances of each particular case. Vacova Co. v. Farrell, 62 Wn.App. 386, 403, 814 P.2d 255 (1991).

Breach of a substantial part of an entire contract gives the injured party an election to abandon the contract, or to perform and recover damages. Colorado Structures, Inc. v. Insurance Co. of the West, 161 Wn.2d 577, 167 P.3d 1125 (2007) (general contractor brought action

against surety to recover on subcontractor's performance bond); Campbell v. Hauser Lumber Co., 147 Wash. 140, 145, 265 P. 468 (1928). In determining whether a breach of some, but not all, of the contract terms is substantial, rather than trivial or inconsequential, the jury may properly consider whether the injured party would have been less willing to enter the contract without those terms. Campbell v. Hauser Lumber Co., 147 Wash. at 148.

According to the Restatement (Second) of Contracts § 241 (1981):

In determining whether a failure to render or to offer performance is material, the following circumstances are significant:

(a) the extent to which the injured party will be deprived of a benefit which he reasonably expected;

(b) the extent to which the injured party can be adequately compensated for the part of that benefit of which he will be deprived;

(c) the extent to which the party failing to perform or to offer to perform will suffer forfeitures;

(d) the likelihood that the party failing to perform or to offer to perform will cure his failures, taking account of all the circumstances including any reasonable assurances;

(e) the extent to which the behavior of the party failing to perform or to offer to perform comports with standards of good faith and fair dealing.

See Bailie Communications, Ltd. v. Trend Business Systems, 53 Wn.App. 77, 765 P.2d 339 (1988), citing and applying the Restatement (Second) criteria. See also DC Farms, LLC v. Conagra Foods Lamb Weston, Inc., 179 Wn.App, 205, 221, 317 P.3d 543 (2014).

For example, in McEachren v. Sherwood & Roberts, Inc., 36 Wn.App. 576, 580, 675 P.2d 1266 (1984), the court found that a seller's refusal to sign a rental agreement that would give buyers control over uncut hay for the period prior to closing was not a material breach that would justify the buyers in refusing to perform under a contract to purchase an entire farm for $625,000. In addition to finding that the breach "did not relate to an essential element of the contract," the court noted that the buyers never informed the seller that they considered her action to be a material breach or gave her an opportunity to address their concern, breaching their duty to act in good faith.

In Vacova Co. v. Farrell, 62 Wn.App. 386, 814 P.2d 255 (1991), on

the other hand, the appellate court upheld a trial court's finding, on summary judgment, that failure to timely pay a three-day note given as an earnest money installment was a material breach, regardless of any notice or opportunity to cure. Under the circumstances, restoration of the parties to their pre-contract position on rescission was eminently feasible. The appellate court distinguished the case from that of a forfeiture situation, in which prior part performance or substantial performance might be followed by material breach, with resulting hardship to a breaching purchaser who "forfeits both that which he intended to purchase and the payments he has previously made." Vacova Co. v. Farrell, 62 Wn.App. at 404.

For further discussion of the issues underlying this instruction, see DeWolf, Allen, and Caruso, 25 Washington Practice, Contract Law and Practice § 10:1 (3d ed.).

[Current as of September 2018.]

WPI 302.04

EXCUSE OF PERFORMANCE—ANTICIPATORY BREACH

A party who is ready, willing, and able to perform is excused from the duty to perform when the other party repudiates the contract by word or act that definitely indicates [he] [she] [it] cannot or will not perform [his] [her] [its] obligations under the contract.

In this case, if (name of party) **proves by a preponderance of evidence that** (name of other party) **repudiated the contract, then** (name of party) **was excused from the duty to** (set forth in simple terms the duty claimed to be excused).

NOTE ON USE

Use this instruction when it is claimed that a party's duty of performance was discharged or excused by the anticipatory breach or repudiation of the contract by the other party. Since either plaintiff or defendant may claim repudiation by the other, insert names of parties in blanks as appropriate.

Use this instruction with WPI 21.01 (Meaning of Burden of Proof—Preponderance of the Evidence).

COMMENT

This instruction is based on various formulations in Washington case law. "One who is ready, willing and able to tender performance is relieved of that duty when the other party by word or act indicates that he will not perform." Sherman v. Lunsford, 44 Wn.App. 858, 863, 723, P.2d 1176 (1986), citing Kreger v. Hall, 70 Wn.2d 1002, 425 P.2d 638 (1967). An "anticipatory breach occurs when one of the parties to a bilateral contract either expressly or impliedly repudiates the contract prior to the time of performance. A party's intent not to perform may not be implied from doubtful and indefinite statements that performance may or may not take place." Wallace Real Estate Inv., Inc. v. Groves, 124 Wn.2d 881, 898, 881 P.2d 1010 (1994); see also, State v. Brown, 92 Wn.App. 586, 602, 965 P.2d 1102 (1998).

Anticipatory breach or repudiation requires a "positive statement or action by the promisor indicating distinctly and unequivocally that he either will not or cannot substantially perform any of his contractual

obligations." Wallace Real Estate Inv., Inc. v. Groves, 124 Wn.2d 881, 898, 881 P.2d 1010 (1994), quoting Olsen Media v. Energy Sciences, Inc., 32 Wn.App. 579, 585, 648 P.2d 493 (1982); see also, Wallace v. Kuehner, 111 Wn.App. 809, 817, 46 P.3d 823 (2002).

Anticipatory breach or repudiation may be asserted by a plaintiff to excuse or discharge the plaintiff's duty to perform a condition precedent. See, e.g., Artz v. O'Bannon, 17 Wn.App. 421, 562 P.2d 674 (1977). The applicable principles and burdens are well illustrated in Puget Sound Service Corp. v. Bush, 45 Wn.App. 312, 316, 724 P.2d 1127 (1986) ("Where a party's breach by non-performance contributes materially to the non-occurrence of a condition of one of his duties, the non-occurrence is excused.").

Issue for jury. "Whether there is a repudiation of contract is a question for the fact finder." Brothers v. Pub. Sch. Emp. of Wash., 88 Wn.App. 398, 408, 945 P.2d 208 (1997); see also Wallace Real Estate Inv., Inc. v. Groves, 124 Wn.2d 124 Wn.2d 881, 897, 881 P.2d 1010 (1994) (question of fact).

For further discussion of the issues underlying this instruction, see DeWolf, Allen, and Caruso, 25 Washington Practice, Contract Law and Practice § 10:23 (3d ed.).

[Current as of September 2018.]

WPI 302.05

ELEMENTS OF EQUITABLE ESTOPPEL

A party is not allowed to make a claim that contradicts or repudiates [his] [her] [its] earlier statement, admission, or conduct on which another has reasonably relied, if the relying party would be injured by such contradiction or repudiation. This is known as "estoppel."

In order to prove estoppel, (insert party claiming estoppel) **has the burden of proving, by clear, cogent, and convincing evidence:**

(1) That (insert other party) **said or did something on which** (insert claiming party) **relied;**

(2) That (insert claiming party) **reasonably relied on** (insert other party's) **statement or conduct; and**

(3) That (insert claiming party) **would be injured if** (insert other party) **were allowed to contradict that statement or conduct now.**

NOTE ON USE

Use this instruction when the jury needs a broad definition of the principle of equitable estoppel. For cases involving equitable estoppel in the specific context of performance issues, use WPI 302.06 (Excuse of Performance—Estoppel) instead of this instruction.

The parties are left undesignated, because the estoppel may be raised by a party seeking enforcement of a contract, i.e., as a defense to a defense, or by a party seeking to avoid enforcement of a contract. When equitable estoppel is asserted as an affirmative defense by a party seeking to avoid enforcement of a contract, combine this instruction with WPI 302.06 (Excuse of Performance—Estoppel).

Use this instruction when the court has determined that the evidence would warrant the application of the principle of equitable estoppel, including a determination that the non-moving party's conduct was sufficiently inconsistent with the claim that the moving party is attempting to defend.

Use this instruction with WPI 160.03 (Fraud—Burden of Proof—Combined with Preponderance of Evidence) to explain the meaning of proof by clear, cogent, and convincing evidence.

Regarding the separate issue of promissory estoppel, which may be asserted in response to a claim of lack of consideration, see the Comment to WPI 301A.01 (Promissory Estoppel).

COMMENT

This instruction is based on the elements of equitable estoppel as set forth in Berschauer/Phillips Const. Co. v. Seattle Sch. Dist. No. 1, 124 Wn.2d 816, 831, 881 P.2d 986 (1994):

> (1) an admission, statement or act inconsistent with a claim afterward asserted; (2) action by another in reasonable reliance on that act, statement, or admission; and (3) injury to the party who relied if the court allows the first party to contradict or repudiate such admission, statement or act.

See also In re Estate of Hambleton, 181 Wn.2d 802, 833, 335 P.3d 398 (2014), cert. denied 136 S.Ct. 318 (2015), and the Comment to WPI 302.06 (Excuse of Performance—Estoppel).

Each of the elements of equitable estoppel must be proved by clear, cogent, and convincing evidence. Lybbert v. Grant County, 141 Wn.2d 29, 35, 1 P.3d 1124 (2000); Berschauer/Phillips Const. Co., 124 Wn.2d 816, 831, 881 P.2d 986 (1994).

In a number of cases the courts have described the second element as action "on the faith of" the other party's statement or act. See, e.g., PUD 1 v. WPPSS, 104 Wn.2d 353, 365, 705 P.2d 1195 (1985). In Leonard v. Washington Emp., Inc., 77 Wn.2d 271, 461 P.2d 538 (1969), the court explained that these elements are not necessarily sufficient: "Not all those who rely upon another's conduct or statement may raise an estoppel. Rather it is only those who have a right to rely upon such acts or representations." For example, the party claiming to have been induced to act must either have been ignorant of the true facts or without the means of acquiring such facts. PUD No. 1 v. WPPSS, 104 Wn.2d at 365. According to the court in *Leonard*, "absent fraud or misrepresentation, estoppel runs in favor only of those who have reasonably relied on another's conduct or declarations." Leonard v. Washington Emp., Inc., 77 Wn.2d at 280.

Generally, a party asserting estoppel must have "clean hands," or be free from fault, see, e.g., Kirk v. Moe, 114 Wn.2d 550, 557, 789 P.2d 84 (1990), Rhoades v. City of Battle Ground, 115 Wn.App. 752, 769–70, 63 P.3d 142 (2003), unless allowing the estoppel would protect the public interest and the non-moving party is more culpable. See Ellis v.

William Penn Life Assur. Co. of America, 124 Wn.2d 1, 873 P.2d 1185 (1994).

[Current as of September 2018.]

WPI 302.06

EXCUSE OF PERFORMANCE—ESTOPPEL

(Name of party) **claims that** (name of party's) **[admission,] [statement,] [or] [act]** (describe) **caused** (name of party) **to fail to perform according to the terms of the contract, and that** (name of party) **should not now be allowed to repudiate or contradict that [admission,] [statement,] [or] [act] by claiming** (describe inconsistent claim).

If you find that (name of party) **has proved, by clear, cogent, and convincing evidence that:**

(1) (name of party) **failed to perform according to the terms of the contract in reliance on** (name of party's) **[admission,] [statement,] [or] [act];**

(2) (name of party) **reasonably relied on** (name of party's) **[admission,] [statement,] [or] [act]; and**

(3) (name of party) **would be injured if** (name of party) **were allowed to contradict that [admission,] [statement,] [or] [act];**

then (name of party's) **performance according to the contract terms will be excused.**

NOTE ON USE

Use this instruction, instead of WPI 302.05 (Elements of Equitable Estoppel), when a party has asserted the affirmative defense of equitable estoppel in the context of a performance issue. Use this instruction when the court has determined that the evidence would warrant the application of the principle of equitable estoppel, including a determination that the non-moving party's conduct was sufficiently inconsistent with the claim that the moving party is attempting to defend.

Include all bracketed terms supported by the evidence. In the blank line marked "(describe)," describe the previous statements or conduct of the non-moving party that are alleged to have caused the moving party to change position. In the blank line marked "(describe inconsistent claim)," describe the non-moving party's trial claim (e.g., breach of contract on the basis of defendant's failure to _____).

Insert an appropriate provision in WPI 300.03 (Burden of Proof on the Issues—Breach of Contract—With Affirmative Defenses).

Use this instruction with WPI 160.03 (Fraud—Burden of Proof—Combined with Preponderance of Evidence) to explain the meaning of proof by clear, cogent, and convincing evidence.

COMMENT

See the Comment to WPI 302.05 (Elements of Equitable Estoppel).

Estoppel may be asserted as an affirmative defense; the party asserting the defense has the burden of proof. See Comment, WPI 300.03 (Burden of Proof on the Issues—Breach of Contract—With Affirmative Defenses); CR 8(c). Equitable estoppel may be used only as a defense, acting as a shield against the enforcement of a contract, even though promissory estoppel may be used offensively to support a cause of action for damages. Chemical Bank v. WPPSS, 102 Wn.2d 874, 901, 691 P.2d 524 (1984).

Each of the elements of equitable estoppel must be proved by clear, cogent, and convincing evidence. Lybbert v. Grant County, State of Wash., 141 Wn.2d 29, 35, 1 P.3d 1124 (2000); Berschauer/Phillips Const. Co. v. Seattle Sch. Dist. No. 1, 124 Wn.2d 816, 881 P.2d 986 (1994); Robinson v. City of Seattle, 119 Wn.2d 34, 82, 830 P.2d 318 (1992).

For further discussion of the issues underlying this instruction, see DeWolf, Allen, and Caruso, 25 Washington Practice, Contract Law and Practice § 10:12 (3d ed.).

[Current as of September 2018.]

WPI 302.07

EXCUSE OF PERFORMANCE—WAIVER

Either party to a contract may waive the right to require performance of the other. A waiver is the intentional giving up of a known right.

A party asserting that its performance is excused on the ground of waiver has the burden of proving that the other party intended to give up its contractual right to that performance after knowing all of the relevant facts.

[A right may be waived in either of two ways. A party may directly state an intent to waive a contractual right, or a party may imply such an intent through his or her statements or conduct. An implied waiver, however, may be based only on unequivocal, rather than doubtful or ambiguous, statements or conduct.]

In this case, (name of party's) **duty to** (set forth performance claimed to be excused) **was excused if** (name of same party) **has proved, by a preponderance of the evidence, that** (name of other party) **waived [his] [her] [its] right to that performance under the contract.**

NOTE ON USE

Use this instruction when a party has asserted waiver in excuse of performance and there is a sufficient evidentiary basis for taking the issue to the jury. Insert an appropriate provision in WPI 300.03 (Burden of Proof on the Issues—Breach of Contract—With Affirmative Defenses) when waiver is asserted as an affirmative defense. Modify the instruction if the condition allegedly waived is an event or occurrence rather than a performance by the party asserting waiver.

Use this instruction with WPI 21.01 (Meaning of Burden of Proof—Preponderance of the Evidence).

If the circumstances warrant, use the bracketed paragraph to explain the requirements for implied waivers. See the Comment below.

It may also be appropriate to add language regarding the effect of a

contractual limit on the terms of a waiver or a contractual non-waiver clause. See the Comment below.

COMMENT

Waiver agreements. A decision to relinquish a known right under the terms of a contract constitutes a waiver, excusing the other party's obligation to perform according to the relevant contract terms. Sherman v. Lunsford, 44 Wn.App. 858, 862–63, 723 P.2d 1176 (1986). A party against whom waiver is claimed must have intended to relinquish the right, advantage, or benefit and the party's action must have been inconsistent with any intent other than to waive it. Wagner v. Wagner, 95 Wn.2d 94, 102, 621 P.2d 1279 (1980).

Unilateral waivers. According to the Washington cases, a waiver may be unilateral and without consideration so long as the right waived was known and existed at the time of the knowing waiver. Sherman v. Lunsford, 44 Wn.App. 858, 862–63, 723 P.2d 1176 (1986), citing Panorama Residential Protective Ass'n v. Panorama Corp. of Washington, 97 Wn.2d 23, 28–29, 640 P.2d 1057 (1982). See also Gorge Lumber Co. v. Brazier Lumber Co., 6 Wn.App. 327, 335, 493 P.2d 782 (1972) ("As a waiver in Washington is unilateral . . ., there can be a waiver without consideration as well."). A party to a contract may waive any contract provision that is made for its benefit. Mike M. Johnson, Inc., v. County of Spokane, 150 Wn.2d 375, 386, 78 P.3d 161 (2003).

Burden of proof. Waiver is an affirmative defense; the party asserting the defense has the burden of proof. See Comment, WPI 300.03 (Burden of Proof on the Issues—Breach of Contract—With Affirmative Defenses); CR 8(c).

Implied waiver. A waiver may be express, or may be inferred from circumstances indicating an intent to waive. Mike M. Johnson, Inc., v. County of Spokane, 150 Wn.2d at 386; Singer Credit Corp. v. Mercer Island Masonry, Inc., 13 Wn.App. 877, 884, 538 P.2d 544 (1975). Nevertheless, "to constitute a waiver, other than by express agreement, there must be unequivocal acts or conduct evincing an intent to waive . . . Intent cannot be inferred from doubtful or ambiguous factors." Wagner v. Wagner, 95 Wn.2d 94, 102, 621 P.2d 1279 (1980) (citations omitted); also Mike M. Johnson, Inc., v. County of Spokane, 150 Wn.2d 375, 386, 78 P.3d 161 (2003). "Mere silence does not constitute a waiver unless there is an obligation to speak." Voelker v. Joseph, 62 Wn.2d 429, 435, 383 P.2d 301 (1963).

Courts disfavor implied waivers of contractual rights to arbitration, so that the party seeking waiver of these rights bears a "heavy" burden of proof. See Brundridge v. Fluor Federal Services, Inc., 109 Wn.App. 347, 356, 35 P.3d 389 (2001); Steele v. Lundgren, 85 Wn.App. 845, 852,

935 P.2d 671 (1997) (also citing several federal cases involving contractual rights to arbitration). In one case, the Court of Appeals stated this principle more broadly, holding that the heavy burden of proof applies to the implied waiver of contractual rights generally. Oregon Mut. Ins. Co. v. Barton, 109 Wn.App. 405, 418, 36 P.3d 1065 (2001) (at issue was an implied waiver of the right to enforce a settlement).

Distinctions among waivers. Some commentators have distinguished among three types of waivers:

- waiver at the time of contract formation (agreement, but no separate consideration required), see, e.g., the circumstances of Sherman v. Lunsford, 44 Wn.App. 858, 723 P.2d 1176 (1986);
- waiver after contracting but before breach (consideration required unless the conditions waived are "immaterial"); and
- waiver after performance alleged to be in breach (which should be analyzed as an election of remedies, not withdrawable once made), see, e.g., Voelker v. Joseph, 62 Wn.2d 429, 383 P.2d 301 (1963); Kessinger v. Anderson, 31 Wn.2d 157, 196 P.2d 289 (1948); Gorge Lumber Co. v. Brazier Lumber Co., 6 Wn.App. 327, 335, 493 P.2d 782 (1972).

Though the cited Washington cases seem to fall within the exceptions to the requirement of consideration for waiver of condition in an executory contract, they do not explicitly distinguish among these applications of the rule.

Nonwaiver clauses. While a nonwaiver clause in the underlying contract may in certain circumstances operate to prevent a waiver, see First Union Management, Inc. v. Slack, 36 Wn.App. 849, 679 P.2d 936 (1984) (clause prevented acceptance of rent from constituting waiver of nonmonetary breaches), courts have strictly construed such clauses in insurance contracts:

> [A] nonwaiver agreement can be waived either expressly or impliedly by the insurer or its authorized representatives. Such agreements are construed strictly against the insurer and liberally in favor of the insured, and will not be extended beyond the exact terms of the agreements. In addition, such an agreement will not operate to prevent a waiver if it is vaguely or ambiguously drafted.

Weber v. Biddle, 4 Wn.App. 519, 524, 483 P.2d 155 (1971).

Treatise. For further discussion of the issues underlying this instruction, see DeWolf, Allen, and Caruso, 25 Washington Practice, Contract Law and Practice § 10:11 (3rd ed.).

[Current as of September 2018.]

WPI 302.08

EXCUSE OF PERFORMANCE—INTERFERENCE WITH CONTRACTUAL PERFORMANCE

If one party enters into a contract with another, there is an implied agreement by each to do nothing that will hinder, prevent, or interfere with the performance of the contract terms by the other.

If (name of party) **proves by a preponderance of the evidence that** (name of other party) **interfered with or prevented** (set forth performance or occurrence), **then** (name of party) **was excused from performing [its] [his] [her] duty of** (set forth performance, or add "showing that" a specified event occurred).

NOTE ON USE

Use this instruction if there is an evidentiary basis for an affirmative defense of interference with contractual performance, or if a party alleges that its duty of performance or the occurrence of a condition precedent was excused by such interference. Use WPI 302.11 (Implied Duty of Good Faith and Fair Dealing), as appropriate, if there is a basis for finding that cooperation was required.

Use the last paragraph to instruct the jury regarding the application of the excuse of interference with contractual performance to the facts of the case.

Use this instruction with WPI 21.01 (Meaning of Burden of Proof—Preponderance of the Evidence).

COMMENT

In every contract there is an implied covenant or condition that the parties will "not interfere with each other's performance, but will cooperate in good faith." Jones Assocs., Inc. v. Eastside Properties, Inc., 41 Wn.App. 462, 471, 704 P.2d 681 (1985), citing Lonsdale v. Chesterfield, 99 Wn.2d 353, 357, 662 P.2d 385 (1983). See also Metropolitan Park Dist. of Tacoma v. Griffith, 106 Wn.2d 425, 437, 723 P.2d 1093 (1986).

However, the duty of good faith does not extend to obligate a party to accept a material change in the terms of the parties' contract. For further discussion about the implied duty of good faith, see the Comment to WPI 302.11 (Implied Duty of Good Faith and Fair Dealing).

When a party is prevented from performing a contract only by the acts of the other party, that party's non-performance is excused. "One who prevents a thing may not avail himself of the nonperformance which he has occasioned." Payne v. Ryan, 183 Wash. 590, 597, 49 P.2d 53 (1935) (plaintiff excused from compliance with condition precedent). See Jones Assocs., Inc. v. Eastside Properties, Inc., 41 Wn.App. 462, 471, 704 P.2d 681 (1985).

See also Restatement (Second) of Contracts § 245 (1981): "Where a party's breach by non-performance contributes materially to the non-occurrence of a condition of one of his duties, the non-occurrence is excused." If there is a claim by the breaching party that the breach did not "contribute materially" to the non-performance by the injured party, the breaching party has the burden of proof as to that proposition. Restatement (Second) of Contracts § 245 comment b (1981); Puget Sound Service Corp. v. Bush, 45 Wn.App. 312, 724 P.2d 1127 (1986).

For further discussion of the issues underlying this instruction, see DeWolf, Allen, and Caruso, 25 Washington Practice, Contract Law and Practice § 10:10 (3d ed.).

[Current as of September 2018.]

WPI 302.09

EXCUSE OF PERFORMANCE—IMPOSSIBILITY OR IMPRACTICABILITY

A party is excused from performing a promise if the performance has been made impossible or impracticable as a result of a fortuitous event that was unexpected and unavoidable by that party. "Fortuitous" means by chance or accident.

"Impossible or impracticable" means that the promise could not be performed, or could only be performed with extreme and unreasonable difficulty, expense, or risk of injury or loss. The mere fact that the performance became more difficult or expensive than originally anticipated does not in itself establish that the promise was impossible or impracticable to perform.

In this case, (name of party) **was relieved of its duty to** (set forth performance claimed to be excused) **if** (name of party) **proves, by a preponderance of evidence, that performance of its promise was "impossible or impracticable" as defined in this instruction.**

NOTE ON USE

Use this instruction after an initial determination by the court that the evidence and circumstances would warrant a finding of impossibility/impracticability under Washington law. When the doctrine of frustration of purpose is applicable, use WPI 303.10 (Excuse of Performance—Frustration of Purpose) instead.

Adapt the last paragraph to inform the jury of the consequences of a finding of impossibility or impracticability, under the circumstances of the case.

Use this instruction with WPI 21.01 (Meaning of Burden of Proof—Preponderance of the Evidence).

COMMENT

Role of the jury. The determination of whether to excuse perfor-

mance because of impossibility/impracticability (WPI 302.09) or frustration (WPI 302.10) has been treated as an issue of law for the court, rather than a factual matter to be determined by a jury. Washington State Hop Producers, Inc., Liquidation Trust v. Goschie Farms, Inc., 112 Wn.2d 694, 773 P.2d 70 (1989). See also Restatement (Second) of Contracts, Introductory Note to Chapter 11, Impracticability of Performance and Frustration of Purpose (1981) ("The question is generally considered to be one of law rather than fact, for the court rather than the jury").

If the facts are undisputed, and the only issue is whether justice requires that performance be excused, then no instruction to the jury is warranted. However, when there is a factual dispute regarding one or more elements of the test for either doctrine (e.g., whether an event was "fortuitous" or "unexpected"), then it may be appropriate to submit the case to the jury with the relevant instruction, but only after the initial determination that a factual dispute warrants such an instruction.

Impossibility and impracticability. Impossibility of performance excuses a party's performance. The doctrine encompasses both "strict impossibility and impracticability due to extreme and unreasonable difficulty, expense, injury or loss. [However, t]he mere fact that a contract's performance becomes more difficult or expensive than originally anticipated, does not justify setting it aside." Thornton v. Interstate Securities Co., 35 Wn.App. 19, 29, 666 P.2d 370 (1983).

The event that renders performance impossible must be "fortuitous and unavoidable on the part of the promisor." Metropolitan Park Dist. of Tacoma v. Griffith, 106 Wn.2d 425, 439, 723 P.2d 1093 (1986). It is conceivable that an event might have been anticipated by the promisee, but so long as that event was fortuitous, and unexpected and unavoidable by *the promisor*, the doctrine of impossibility may apply. However, if the promisee claims to have anticipated the event, that would be relevant to whether or not the event was unexpected by the promisor.

When the existence of a specific thing is "necessary for the performance of a contract," the fortuitous destruction of that thing excuses the performance of the promisor unless it has "clearly assumed the risk of its continuous existence." Metropolitan Park Dist. of Tacoma v. Griffith, 106 Wn.2d 425, 439, 723 P.2d 1093 (1986). Cf. Restatement (Second) of Contracts, Introductory Note to Chapter 11, Impracticability of Performance and Frustration of Purpose (1981) (court determines whether non-occurrence of the event was "basic assumption" of the parties, taking all circumstances into account, and making judgment as to which party assumed the risk of its occurrence).

It is not necessary that the event be totally unforeseeable, if it was unexpected. Thornton v. Interstate Securities Co., 35 Wn.App. 19, 666 P.2d 370 (1983).

Fortuitous event. A fortuitous event is one that occurs by chance or accident. Black's Law Dictionary (10th ed. 2014).

For further discussion of the issues underlying this instruction, see DeWolf, Allen, and Caruso, 25 Washington Practice, Contract Law and Practice § 10:16 et seq. (3d ed.).

[Current as of September 2018.]

WPI 302.10

EXCUSE OF PERFORMANCE—FRUSTRATION OF PURPOSE

A party's remaining duties of performance under a contract are excused if the party's principal purpose is substantially frustrated, without that party's fault, by the occurrence of an unforeseen event when the non-occurrence of such an event was a basic assumption on which the contract was made.

In this case, (name of party) **is relieved of the duty to** (set forth performance claimed to be excused) **if** (name of party) **proves, by a preponderance of the evidence, that [his] [her] [its] principal purpose in entering into the contract was substantially frustrated, without** (name of party's) **fault, by the occurrence of an unforeseen event and that the lack or absence of such occurrence was a basic assumption, by [both] [all] contracting parties, on which the contract was made.**

NOTE ON USE

Use this instruction after an initial determination by the court that the evidence and circumstances would warrant a finding of frustration of purpose under Washington law.

Use this instruction with WPI 21.01 (Meaning of Burden of Proof—Preponderance of the Evidence).

COMMENT

Although application of the doctrine of frustration of purpose is a question of law, see Felt v. McCarthy, 130 Wn.2d 203, 207, 922 P.2d 90 (1996), the jury may still need to resolve related factual disputes. For further discussion, see the Comment to WPI 302.09 (Excuse of Performance—Impossibility or Impracticability).

Washington courts have adopted Restatement (Second) of Contracts § 265 (1981), Discharge by Supervening Frustration. Felt v. McCarthy, 130 Wn.2d 203, 207, 922 P.2d 90 (1996); Washington State Hop Producers, Inc. Liquidation Trust v. Goschie Farms, Inc., 112 Wn.2d 694, 773 P.2d 70 (1989). Section 265 provides that:

Where, after a contract is made, a party's principal purpose is

substantially frustrated without his fault by the occurrence of an event the non-occurrence of which was a basic assumption on which the contract was made, his remaining duties to render performance are discharged, unless the language or the circumstances indicate the contrary.

The instruction uses the term excused, rather than discharged, because it would be more familiar to jurors.

The doctrine requires more than the unforeseeability of the frustrating event; the assumption that a desired objective was possible must "be so completely the basis of the contract that, *as both parties understand,* without it the transaction would make little sense." Felt v. McCarthy, 78 Wn.App. 362, 367, 898 P.2d 315 (1995) (emphasis added; citing Weyerhaeuser Real Estate Co. v. Stoneway Concrete, Inc., 96 Wn.2d 558, 637 P.2d 647 (1981)), affirmed at 130 Wn.2d 203, 208–09, 922 P.2d 90 (1996). The doctrine does not apply if the contract discloses an allocation of the risk to one party or the other. Scott v. Petett, 63 Wn.App. 50, 60, 816 P.2d 1229 (1991).

According to the Restatement (Second) of Contracts § 266(2) (1981), the principle also applies to facts existing at the time of contracting, of which the party had no reason to know:

> Where, at the time a contract is made, a party's principal purpose is substantially frustrated without his fault by a fact of which he has no reason to know and the non-existence of which is a basic assumption on which the contract is made, no duty of that party to render performance arises, unless the language or circumstances indicate the contrary.

Compare WPI 301.08 (Enforceability—Mutual Mistake) and WPI 301.09 (Enforceability—Unilateral Mistake).

[Current as of September 2018.]

WPI 302.11

IMPLIED DUTY OF GOOD FAITH AND FAIR DEALING

A duty of good faith and fair dealing is implied in every contract. This duty requires the parties to cooperate with each other so that each may obtain the full benefit of performance. However, this duty does not require a party to accept a material change in the terms of [his] [her] [its] contract.

NOTE ON USE

Use this instruction whenever the jury requires an explanation of the duty of good faith.

If it is not clear from the statement of claims instruction, an additional paragraph should be added to inform the jury of the consequence of their finding that a party breached its duty of good faith. See, e.g., the second paragraph of the instruction in WPI 302.08 (Excuse of Performance—Interference With Contractual Performance).

COMMENT

The "implied duty of good faith and fair dealing" in every contract "obligates the parties to cooperate with each other so that each may obtain the full benefit of performance." Badgett v. Security State Bank, 116 Wn.2d 563, 569, 807 P.2d 356 (1991). This obligation, while prohibiting one party from interfering with the other's performance, does not require a party to "affirmatively assist" the other's performance. State v. Trask, 91 Wn.App. 253, 272–73, 957 P.2d 781 (1998).

Further, the duty of good faith neither obligates a party to accept a material change in the terms of its contract, Betchard-Clayton, Inc. v. King, 41 Wn.App. 887, 890, 707 P.2d 1361 (1985), nor does it "inject substantive terms into the parties' contract." Rather, it requires only that the parties perform in good faith the obligations imposed by their agreement. Barrett v. Weyerhaeuser Co. Severance Pay Plan, 40 Wn.App. 630, 635 n. 6, 700 P.2d 338 (1985). Thus, the duty arises only in connection with terms agreed to by the parties. See Badgett v. Security State Bank, 116 Wn.2d 563, 569, 807 P.2d 356 (1991); Lonsdale v. Chesterfield, 99 Wn.2d 353, 662 P.2d 385 (1983); Miller v. Othello Packers, Inc., 67 Wn.2d 842, 843–44, 410 P.2d 33 (1966); Matson v. Emory, 36 Wn.App. 681, 676 P.2d 1029 (1984); CHG Int'l., Inc. v. Robin Lee Inc., 35 Wn.App. 512, 667 P.2d 1127 (1983).

There is no "free-floating" duty of good faith and fair dealing, unattached to an existing contract; rather, it exists only in relation to performance of a specific contract term. Keystone Land & Development Co. v. Xerox Corp., 152 Wn.2d 171, 177, 94 P.3d 945 (2004); see also Donald B. Murphy Contractors, Inc. v. King County, 112 Wn.App. 192, 197, 49 P.3d 912 (2002) ("If no [specific] contractual duty exists, there is nothing that must be performed in good faith."); Goodyear Tire & Rubber Co. v. Whiteman Tire, Inc., 86 Wn.App. 732, 738–40, 935 P.2d 628 (1997).

Washington courts generally do not imply a duty of good faith and fair dealing in at-will employment contracts. Trimble v. Washington State University, 140 Wn.2d 88, 96–97, 993 P.2d 259 (2000); Willis v. Champlain Cable Corp., 109 Wn.2d 747, 748 P.2d 621 (1988). Nevertheless, "under some egregious circumstances an implied covenant of good faith may be appropriate" for these contracts. Trimble v. Washington State University, 140 Wn.2d at 97.

For further discussion of the issues underlying this instruction, see DeWolf, Allen, and Caruso, 25 Washington Practice, Contract Law and Practice § 5:13 (3d ed.).

[Current as of September 2018.]

CHAPTER 303

CONTRACTS—REMEDIES

WPI 303.01 Measure of Expectation Damages—Breach of Contract—No Counterclaim
WPI 303.02 Measure of Expectation Damages—Breach of Contract—Counterclaim
WPI 303.03 Contract—Measure of Damages—Direct Damages—Special Cases
WPI 303.04 Contract—Damages—Lost Profits
WPI 303.05 Contract—Reliance Damages
WPI 303.06 Contract—Mitigation of Damages
WPI 303.07 Contract—Liquidated Damages
WPI 303.08 Contract—Damages—Restitution

WPI 303.01

MEASURE OF EXPECTATION DAMAGES—BREACH OF CONTRACT—NO COUNTERCLAIM

It is the duty of the court to instruct you as to the measure of damages. [By instructing you on damages the court does not mean to suggest for which party your verdict should be rendered.]

In order to recover actual damages, the plaintiff has the burden of proving that the defendant breached a contract with [him] [her] [it], and that plaintiff incurred actual [economic] damages as a result of the defendant's breach, and the amount of those damages.

[If your verdict is for plaintiff on plaintiff's breach of contract claim and] if you find that plaintiff has proved that [he] [she] [it] incurred actual damages and the amount of those actual damages, then you shall award actual damages to the plaintiff.

Actual damages are those losses that were reason-

ably foreseeable, at the time the contract was made, as a probable result of a breach. A loss may be foreseeable as a probable result of a breach because it follows from the breach either

(a) in the ordinary course of events, or

(b) as a result of special circumstances, beyond the ordinary course of events, that the party in breach had reason to know.

In calculating the plaintiff's actual damages, you should determine the sum of money that will put the plaintiff in as good a position as [he] [she] [it] would have been in if both plaintiff and defendant had performed all of their promises under the contract.

The burden of proving damages rests with the plaintiff and it is for you to determine, based upon the evidence, whether any particular element has been proved by a preponderance of the evidence. You must be governed by your own judgment, by the evidence in the case, and by these instructions, rather than by speculation, guess, or conjecture.

NOTE ON USE

Use this instruction in a breach of contract action without a counterclaim. When a counterclaim is presented, use WPI 303.02 (Measure of Damages—Breach of Contract—Counterclaim), instead.

Use this instruction when expectation damages are sought, rather than reliance damages. For reliance damages, use WPI 303.05 (Contract—Reliance Damages).

Use this instruction with an explanation of direct damages, as set forth in WPI 303.03 (Contract—Measure of Damages—Direct Damages—Special Cases), as is appropriate to the facts of the case. When there is an evidentiary basis for an award of lost profits, use WPI 303.04 (Contract—Damages—Lost Profits).

Use the limiting adjective "economic" before "damages" in the second paragraph, unless the case falls within the exceptions noted in the Comment under the heading "Mental Distress."

If a valid liquidated damage clause applies, use WPI 303.07 (Contract—Liquidated Damages) instead of this instruction.

COMMENT

Recoverable damages. The seminal case on contract damages is Hadley v. Baxendale, 9 Ex. 341, 354, 156 Eng. Rep. 145, 151 (1854), in which the court described damages recoverable for a breach of contract as those that:

> may fairly be considered either arising naturally, i.e., according to the usual course of things, from such breach of contract itself, or such as may reasonably be supposed to have been in the contemplation of the parties, at the time they made the contract, as the probable result of the breach of it.

See Gaglidari v. Denny's Restaurants, Inc., 117 Wn.2d 426, 445–46, 815 P.2d 1362 (1991).

Damages in contract actions differ significantly from damages in tort actions. Alejandre v. Bull, 159 Wn.2d 674, 682, 153 P.3d 864 (2007). Purely economic damages are specifically recoverable in contract actions, as opposed to tort actions. Berschauer/Phillips Constr. Co. v. Seattle Sch. Dist. No. 1, 124 Wn.2d 816, 828, 881 P.2d 986 (1994). The purpose of damages in a breach of contract action is "not a mere restoration to a former position, as in tort, but the awarding of a sum which is the equivalent of performance of the bargain—the attempt to place the plaintiff in the position he would be in if the contract had been fulfilled . . . ." Rathke v. Roberts, 33 Wn.2d 858, 865, 207 P.2d 716 (1949); accord TMT Bear Creek Shopping Center, Inc., v. Petco Animal Supplies, Inc., 140 Wn.App. 191, 210, 165 P.3d 1271 (2007); Jacob's Meadow Owners Ass'n v. Plateau 44 II, LLC, 139 Wn.App. 743, 757 n.3, 162 P.3d 1153 (2007).

On the other hand, damages in contract actions are generally narrower than damages in tort actions in that they are limited to compensation for economic harm or pecuniary loss; see the discussion of mental distress below.

According to the Restatement (Second) of Contracts § 351 (1981):

> (1) Damages are not recoverable for loss that the party in breach did not have reason to foresee as a probable result of the breach when the contract was made.
>
> (2) Loss may be foreseeable as a probable result of a breach because it follows from the breach
>
> (a) in the ordinary course of events, or

(b) as a result of special circumstances, beyond the ordinary course of events, that the party in breach had reason to know.

(3) A court may limit damages for foreseeable loss by excluding recovery for loss of profits, by allowing recovery only for loss incurred in reliance, or otherwise if it concludes that in the circumstances justice so requires in order to avoid disproportionate compensation.

"The amount of damages should reflect what is required to place the [injured party] in the same financial position he would have enjoyed in the absence of the breach." Family Medical Bldg., Inc., v. Dept. of Social & Health Services, 104 Wn.2d 105, 114, 702 P.2d 459 (1985); accord Restatement (Second) of Contracts § 347 (1981). Regarding lost profits, however, see WPI 303.04 (Contract—Damages—Lost Profits) and its Comment.

Reliance damages. As an alternative to the general benefit-of-the-bargain measure of damages for a breach of contract action, an injured party may recover damages based on reliance interest, when that party cannot prove with reasonable certainty what profit would have been made had the contract been performed. Such damages may include expenditures made in preparation for performance, or in performance, minus any loss that the party in breach can prove with reasonable certainty the injured party would have suffered if the contract had been performed. Family Med. Bldg., Inc., v. Dept. of Soc. & Health Services, 104 Wn.2d 105, 114, 702 P.2d 459 (1985). See WPI 303.05 (Contract—Reliance Damages) and its Comment. When such damages are sought, the instruction's next-to-last paragraph should be eliminated.

Mental distress. With certain limited exceptions, no damages are awarded for mental or emotional distress resulting from a breach of contract. Restatement (Second) of Contracts § 353 (1981); DeWolf, Allen, and Caruso, 25 Washington Practice, Contract Law and Practice § 14:1 (3rd ed.). Specifically, damages for mental suffering are not recoverable in a contract action except for certain categories of contracts for which a breach is particularly likely to lead to emotional distress. See Gaglidari v. Denny's Restaurants, Inc., 117 Wn.2d 426, 443–44, 815 P.2d 1362 (1991) (recoverable for contracts of carriers and innkeepers with passengers and guests; recoverable for contracts for the disposition of bodies or delivery of messages concerning death; not recoverable for contracts of employment). Cf. Wright v. Beardsley, 46 Wash. 16, 89 P. 172 (1907) (recoverable under contract theory for improper burial of child).

Nominal damages. The WPI Committee considered including the following provision in this instruction, but in view of the Washington

cases on this subject, determined that it is not appropriate for inclusion in a breach of contract action for damages only:

> [If your verdict is for the plaintiff on plaintiff's claim of breach of contract, then] you will award the plaintiff actual damages or the court will award a small amount of nominal damages.

While the traditional rule is that an action will lie for breach of contract without proof of injury, resulting in nominal damages, see DeWolf, Allen, and Caruso, 25 Washington Practice, Contract Law and Practice § 14:3 (3d ed.), there is a line of cases in which Washington courts have held to the contrary, when the suit is for damages only. Ketchum v. Albertson Bulb Gardens, 142 Wash. 134, 139, 252 P. 523 (1927); Sorrel v. Eagle Healthcare, Inc., 110 Wn.App. 290, 296, 38 P.3d 1024 (2002) ("Dismissal of an action for damages where no property rights are involved need not be reversed if damages are nominal. This is because the law does not deal with trifles."); Wilkerson v. Wegner, 58 Wn.App. 404, 793 P.2d 983 (1990) (summary judgment for defendant when proof of any damage entirely speculative in lost opportunity to compete for prize money).

On the other hand, there are Washington cases reciting that nominal damages are appropriate in some cases where there is no proof of substantial damage, see, e.g., Ford v. Trendwest Resorts, Inc., 146 Wn.2d 146, 158, 43 P.3d 1223 (2002) (remanding case for entry of nominal damages on breach of employment contract claim on theory that nominal damages are available in all contract actions "where, from the nature of the case, some injury has been done, the amount of which the proofs entirely fail to show"); Seymour v. Jaffe, 78 Wash. 1, 138 P. 276 (1914) (non-negligent seller, unable to convey real property for failure of title). There are also, however, many cases in which the courts, through various procedural devices, render nominal damage awards in contract actions essentially meaningless. E.g., Lee v. Bergesen, 58 Wn.2d 462, 364 P.2d 18 (1961); Commercial Inv. Co. v. National Bank of Commerce, 36 Wash. 287, 78 P. 910 (1904); Johnson v. Cook, 24 Wash. 474, 64 P. 729 (1901).

For a detailed discussion of damages issues, see DeWolf, Allen, and Caruso, 25 Washington Practice, Contract Law and Practice, Chapter 14 (3d ed.).

[Current as of September 2018.]

WPI 303.02

MEASURE OF EXPECTATION DAMAGES—BREACH OF CONTRACT—COUNTERCLAIM

It is the duty of the court to instruct you as to the measure of damages. In this case, the plaintiff and the defendant each claim to have suffered damages as a result of a breach of contract by the other. [By instructing you on damages the court does not mean to suggest for which party your verdict should be rendered.]

In order for either party to recover actual damages, that party has the burden of proving that the other party breached a contract with [him] [her] [it], that the party incurred actual [economic] damages as a result of the other party's breach, and the amount of those damages.

[If your verdict is for the plaintiff on plaintiff's breach of contract claim and] if you find that plaintiff has proved that [he] [she] [it] incurred actual damages and the amount of those actual damages, then you shall award actual damages to the plaintiff.

[If your verdict is for the defendant on defendant's breach of contract claim, and] if you find that defendant has proved that defendant incurred actual damages and the amount of those actual damages, then you shall award actual damages to the defendant.

Actual damages are those losses that were reasonably foreseeable at the time the contract was made. A loss may be foreseeable as a probable result of a breach because it follows from the breach either

(a) in the ordinary course of events, or

(b) as a result of special circumstances, beyond the ordinary course of events, that the party in breach had reason to know.

In calculating a party's actual damages, you should determine the sum of money that will put that party in as good a position as that party would have been in if both parties had performed all of their promises under the contract.

The burden of proving damages rests with the party claiming them and it is for you to determine, based upon the evidence, whether any particular element has been proved by a preponderance of the evidence. In determining an award of damages to either party, you must be governed by your own judgment, by the evidence in the case, and by these instructions, rather than by speculation, guess, or conjecture.

NOTE ON USE

Use this instruction in a breach of contract action with a counterclaim.

See the Note on Use to WPI 303.01 (Measure of Expectation Damages—Breach of Contract—No Counterclaim).

Use the bracketed phrases as appropriate.

When the court determines that a set-off is appropriate, this instruction should generally be given with a verdict form in which the jury spells out the damages awarded to both parties. When an affirmative defense is asserted as a set-off, a separate instruction should be drafted.

COMMENT

For the general measure of damages in a breach of contract action, see the Comment to WPI 303.01 (Measure of Expectation Damages—Breach of Contract—No Counterclaim).

If both parties are awarded damages and a defendant is awarded a set-off that is less than the plaintiff's judgment, the plaintiff is entitled to judgment for the difference, while the defendant is entitled to judgment when the amount of the defendant's set-off exceeds the plaintiff's judgment. RCW 4.56.060 and 4.56.070. For specific rules regarding set-offs, see generally RCW 4.32.120 through 4.32.150, RCW 4.56.050 through 4.56.075, and CR 13(j) (regarding assignee).

In some types of cases, such as unlawful detainer actions, counterclaims and set-offs may not be allowed unless the court determines that the defendant's claims relate to possession of the property. See, e.g., Heaverlo v. Keico Industries, Inc., 80 Wn.App. 724, 911 P.2d 406 (1996).

Special rules apply to the issue of whether prejudgment interest is available on the whole amount of a liquidated claim, when it is offset by an unliquidated counterclaim, or whether it is available only on the balance remaining after the offset of the unliquidated claim. See, e.g., Jet Boats, Inc. v. Puget Sound Nat. Bank, 44 Wn.App. 32, 721 P.2d 18 (1986), or Robblee v. Robblee, 68 Wn.App. 69, 841 P.2d 1289 (1992), citing Mall Tool Co. v. Far West Equipment Co., 45 Wn.2d 158, 273 P.2d 652 (1954).

In some circumstances, a defendant may be entitled to damages on the basis of an affirmative defense, rather than a counterclaim. See, e.g., Seattle First Nat. Bank, N.A. v. Siebol, 64 Wn.App. 401, 824 P.2d 1252 (1992) (in foreclosure action, borrower entitled to equitable set-off for lost profits on basis of promissory estoppel).

For a detailed discussion of damages issues, see DeWolf, Allen, and Caruso, 25 Washington Practice, Contract Law and Practice, Chapter 14 (3d ed.).

[Current as of September 2018.]

WPI 303.03

CONTRACT—MEASURE OF DAMAGES—DIRECT DAMAGES—SPECIAL CASES

With regard to the breach of contract claim[s] of the [plaintiff] [defendant], in your determination of damages you are to use the following measure of damages, in the amounts proved by the [plaintiff] [defendant]:

(here insert the measure of damages appropriate to the type of contract breach).

NOTE ON USE

Use this instruction, spelling out a specific measure of damages, with WPI 303.01 (Measure of Expectation Damages—Breach of Contract—No Counterclaim) or WPI 303.02 (Measure of Expectation Damages—Breach of Contract—Counterclaim), as appropriate. For specific measures of damages in various fact situations, see the Comment below.

Insert the appropriate party designation for the claimant whose measure of damages is being described.

COMMENT

As noted in the Comment to WPI 303.01 (Measure of Expectation Damages—Breach of Contract—No Counterclaim), the purpose of damages in a breach of contract action is "the awarding of a sum which is the equivalent of performance of the bargain—the attempt to place the plaintiff in the position he would be in if the contract had been fulfilled . . . ." Rathke v. Roberts, 33 Wn.2d 858, 865, 207 P.2d 716 (1949). On the other hand, recovery is "limited to the loss he has actually suffered by reason of the breach," and the plaintiff is "not entitled to be placed in a better position than he would have been in if the contract had not been broken." Rathke v. Roberts, 33 Wn.2d at 865.

Direct, or general, damages are those that flow from the breach of a contract "in the ordinary course of events." Restatement (Second) of Contracts § 351(2)(a) (1981). A number of specific rules for measuring such damages in various typical contractual situations have evolved, and should be set forth as applicable, or adapted to similar situations.

Buyer's breach of contract to perform a service. When the contract was for hauling associated stores' merchandise from Seattle

and Tacoma to Spokane, proper measure of damages was the lost net profit on the hauler's operation, defined as the difference between the costs of operation and the contract price for freight in the amount that the jury believed the hauler would have transported during the contract period. Bracy v. United Retail Merchants, 189 Wash. 162, 63 P.2d 491 (1937). When the service provider is an individual, the jury is to deduct from net profit the claimant's wages and earnings from other sources. Bracy v. United Retail Merchants, 189 Wash. at 168. Cf. Restatement (Second) of Contracts § 349, comment d (1981) (if injured party could have provided additional services, he is entitled to lost profits by virtue of lost volume).

The buyer of hauling services, which breached its agreement to keep the road in adequate repair, was liable for the difference between the actual cost of hauling and the cost of hauling if the road had been in the promised condition. Beeson Bros. v. Chambers, 155 Wash. 564, 285 P. 433 (1930).

Buyer's breach of contract to purchase and install special equipment. A seller is entitled to recover the net profit, i.e., the contract price minus the cost, of the sale and installation of special refrigeration equipment. Rathke v. Roberts, 33 Wn.2d 858, 865, 207 P.2d 716 (1949).

Contractor's breach of construction contract—Unfinished or defective construction. An owner may recover from a contractor for unfinished or defective construction, either (1) the reasonable cost of completion of the construction in accordance with the contract, unless such cost exceeds the remaining value of the contract, or (2) the difference between the value the construction would have had and the value of the performance received by the owner. Alpine Industries, Inc., v. Gohl, 30 Wn.App. 750, 758, 637 P.2d 998 (1981), citing Restatement (First) of Contracts § 346 (1932); see also Panorama Village Homeowners Ass'n v. Golden Rule Roofing, Inc., 102 Wn.App. 422, 427–28, 10 P.3d 417 (2000) (citing, inter alia, Restatement (Second) of Contracts §§ 347 and 348 (1981)).

This rule is consistent with the general principle that if a contract has been substantially performed, the measure of damage for defects in the performance is the cost of remedying the defects. But if the cost of correcting the defects would exceed the amount of the contract, then "it follows that there has not been a substantial performance. In such a case, the proper measure of damages is the difference between the value of the work performed and the value it would have had if the work had been done properly." Alpine Industries, Inc., v. Gohl, 30 Wn.App. 750, 759, 637 P.2d 998 (1981). It is error to instruct jurors that they may award damages for both the cost of repairs and diminished

market value. However, the owner may recover both the cost of repairs and, in a proper case, lost profits as special or consequential damages. Alpine Industries, Inc., v. Gohl, 30 Wn.App. at 759. See WPI 303.04 (Contract—Damages—Lost Profits).

Employer's breach of contract of employment. An employee who has been injured by an employer's breach of contract of employment is entitled to recover future lost wages for such period of time as the employee is able to prove with reasonable certainty is attributable to the breach. Kohn v. Georgia-Pacific Corp., 69 Wn.App. 709, 850 P.2d 517 (1993). For employment at will contracts, however, different rules apply. See Ford v. Trendwest Resorts, Inc., 146 Wn.2d 146, 43 P.3d 1223 (2002) (holding that "lost earnings cannot measure damages for the breach of an employment at will contract because the parties to such a contract do not bargain for future earnings").

Landlord's breach of covenant regarding use of property. The measure of general damages for breach of a landlord's covenant regarding use of rental property is the difference between the rental value of the premises in the condition of repair or utility required by the covenant and the rental value of the premises in the actual condition of the property. Pappas v. Zerwoodis, 21 Wn.2d 725, 734, 153 P.2d 170 (1944) (covenant to repair roof and walls); Matzger v. Arcade Bldg. & Realty Co., 80 Wash. 401, 141 P. 900 (1914) (interference with access to light and ventilation); Purcell v. Warburton, 70 Wash. 129, 126 P. 89 (1912) (covenant to heat). Cf. Gilmartin v. Stevens Inv. Co., 43 Wn.2d 289, 261 P.2d 73 (1953) (breach by seller of contract to supply water to land, difference between value of land with water and without).

In a proper case, a commercial tenant may also be able to recover lost profits attributable to the breach of the landlord's covenant. See Pappas v. Zerwoodis, 21 Wn.2d 725, 153 P.2d 170 (1944), and WPI 303.04 (Contract—Damages—Lost Profits).

Lessee's breach of lease. When the lessor makes a reasonable effort to mitigate damages, the lessor is entitled to recover rental at the contract rate for the period reasonably necessary to re-rent the premises, plus the difference, if any, between the actual rental rate and the contractual rental rate for the term of the lease. Family Medical Bldg., Inc., v. Dept. of Soc. & Health Services, 104 Wn.2d 105, 702 P.2d 459 (1985).

For a detailed discussion of damages issues, see DeWolf, Allen and Caruso, 25 Washington Practice, Contract Law and Practice, Ch. 14 (3d ed.).

[Current as of September 2018.]

WPI 303.04

CONTRACT—DAMAGES—LOST PROFITS

In this case, (insert name of party) **claims lost profits.** (Name of party's) **damages may include net profits if** (name of party) **proves with reasonable certainty that net profits would have been earned, but were not earned because of** (name of other party's) **breach.**

"Reasonable certainty" relates to the fact of damage rather than the amount of damage.

NOTE ON USE

Use this instruction with WPI 303.01 (Measure of Expectation Damages—Breach of Contract—No Counterclaim) or 303.02 (Measure of Expectation Damages—Breach of Contract—Counterclaim), as appropriate.

When appropriate, insert a sentence to describe net profits, such as "Net profits in this case mean the difference between the contract price and plaintiff's costs [times _____]." In some instances, the final phrase should include a specific ascertainable quantity (e.g., the number of months remaining in a contract), while in other cases it may be appropriate to have the jury determine the amount (e.g., the number of units that plaintiff could reasonably have expected to sell during the contract period).

It is preferable to keep this instruction separate from WPI 303.03 (Contract—Measure of Damages—Direct Damages—Special Cases), even where that instruction is given regarding some other item of damage distinguishable from the general instructions regarding contract damages in WPI 303.01 (Measure of Expectation Damages—Breach of Contract—No Counterclaim) and WPI 303.02 (Measure of Expectation Damages—Breach of Contract—Counterclaim). The reason is that the "reasonable certainty" requirement applies only to the fact of lost profits, and therefore warrants separate treatment.

COMMENT

Lost profits may be an item of direct or general damages, see the Comment to WPI 303.03 (Contract—Measure of Damages—Direct Damages—Special Cases), as when the buyer has breached a contract for the sale of a service, Bracy v. United Retail Merchants, 189 Wash. 162, 63 P.2d 491 (1937), or property, Rathke v. Roberts, 33 Wn.2d 858, 207 P.2d 716 (1949).

When there is an evidentiary basis for recovery of lost profits as special or consequential damages, they may be recovered in addition to the general measure of damages applicable to the type of contract breach in question. See, e.g., Pappas v. Zerwoodis, 21 Wn.2d 725, 153 P.2d 170 (1944) (direct damages of diminished rental value plus consequential damages of tenant's lost profits); Alpine Industries, Inc. v. Gohl, 30 Wn.App. 750, 637 P.2d 998 (1981) (direct damages of cost of repair of construction defect plus consequential damages of lost profits from construction delay). Generally, lost profits are consequential damages only when they would have been generated by transactions that were separate from, but depended upon, the contract that was breached.

The rule regarding lost profits as a matter of special, or consequential, damages stems from Hadley v. Baxendale, 9 Ex. 341, 156 Eng. Rep. 145 (1854). In that case, defendant's delay in shipping a broken shaft to an engineering company resulted in the lengthened closure of plaintiff's mill with attendant loss of profits. The court reversed the jury award of the lost profits as damages, on the ground that an aggrieved party may recover only those damages "as may fairly and reasonably be considered [as] . . . arising naturally, i.e., according to the usual course of things, from such breach of contract itself," or those damages "as may reasonably be supposed to have been in the contemplation of both parties, at the time they made the contract, as the probable result of the breach of it." Hadley v. Baxendale, 156 Eng. Rep. at 151. As is evident from this quotation from Hadley v. Baxendale, the requirement of "reasonable certainty" may be related historically to the requirement of "foreseeability," which is already included in WPI 303.01 (Measure of Expectation Damages—Breach of Contract—No Counterclaim) and 303.02 (Measure of Expectation Damages—Breach of Contract—Counterclaim).

The consequential damages rule regarding lost profits applies to the Hadley v. Baxendale situation of the on-going profits of an enterprise, rather than a profit that may be expected on a single transaction that is the subject of the contract at issue. See Gilmartin v. Stevens Inv. Co., 43 Wn.2d 289, 295, 261 P.2d 73 (1953) (lost "profit" really diminution of value of land from breach of contract to supply water, item of direct damages).

Reasonable certainty requirement. A party is entitled to recover lost profits in a breach of contract action when "(1) they are within the contemplation of the parties at the time the contract was made, (2) they are the proximate result of defendant's breach and (3) they are proven with reasonable certainty." Tiegs v. Watts, 135 Wn.2d 1, 17, 954 P.2d 877 (1998); Larsen v. Walton Plywood Co., 65 Wn.2d 1, 15, 390 P.2d 677 (1964). "Lost profits cannot be recovered where they are speculative, uncertain and conjectural." Tiegs v. Watts, 135 Wn.2d at 18. The "reasonable certainty" language appears in many Washington cases, although it has never been defined.

The language may be qualified in several significant respects. First, there are cases permitting latitude in the *amount* of damages once the *fact* of damages has been proved. "The doctrine respecting the matter of certainty, properly applied, is concerned more with the fact of damage than with the extent or amount of damage." Alpine Industries, Inc. v. Gohl, 30 Wn.App. 750, 754, 637 P.2d 998, 645 P.2d 737 (1981) (quoting Gaasland Co. v. Hyak Lumber & Millwork, Inc., 42 Wn.2d 705, 712–713, 257 P.2d 784 (1953)). "[W]here the fact of damage is firmly established, the wrongdoer is not free of liability because of difficulty in establishing the dollar amount of damages." Reefer Queen Co. v. Marine Const. & Design Co., 73 Wn.2d 774, 781, 440 P.2d 448 (1968). "Difficulty in ascertaining the damages, or uncertainty as to the amount, provides no basis in logic for denial *in toto*." Sposari v. Matt Malaspina & Co., 63 Wn.2d 679, 689, 388 P.2d 970, 975 (1964). "If the evidence affords a reasonable basis for establishing the loss, an issue arises to be resolved by the trier of facts." Sposari v. Matt Malaspina & Co., 63 Wn.2d 679, 689, 388 P.2d 970, 975 (1964).

A second qualification of the "reasonable certainty" language relates to apportionment of damages among different causes. "[A]bsolute certainty is not required" when "the amount of damage is not susceptible of exact apportionment between the defendant's fault and other factors contributing to the loss." Alpine Industries, Inc., v. Gohl, 30 Wn.App. 750, 755, 637 P.2d 998, 645 P.2d 737 (1981). If a plaintiff claiming lost profit damages "proves that the defendant's fault was a cause of lost profits, the plaintiff is not required to prove the entire loss was due to the defendant's fault." Alpine Industries, Inc., v. Gohl, 30 Wn.App. at 755. Again, "[t]he trier of fact must exercise a large measure of responsible and informed discretion where the fact of damage is proved." Long v. T-H Trucking Co., 4 Wn.App. 922, 927, 486 P.2d 300 (1971).

A third qualification of the "reasonable certainty" language relates to the "new business rule." In some cases, the rule precludes recovery of lost profits for a new business without a profit history or records of similarly situated businesses. See, e.g., Farm Crop Energy v. Old Nat. Bank of Washington, 109 Wn.2d 923, 750 P.2d 231 (1988).

For a detailed discussion of damages issues, see DeWolf, Allen, and Caruso, 25 Washington Practice, Contract Law and Practice, Ch. 14 (3d ed.).

[Current as of September 2018.]

WPI 303.05

CONTRACT—RELIANCE DAMAGES

[If you find (insert appropriate predicate, if reliance damages are an alternative option for jury)**, then] [the plaintiff] has the right to recover damages which would place [him] [her] [it] in the same position as if the contract had never been entered into.**

You are to calculate the reasonable expenditures made by [the plaintiff] in reliance on [the defendant's] [promise] [conduct], subtracting the value of any benefits that [the plaintiff] obtained as a result of those expenditures, and also subtracting the amount of any loss that [the defendant] proves [the plaintiff] would have sustained had the contract been performed.

NOTE ON USE

Use this instruction when a contract is based upon promissory estoppel, or in other instances when the jury may award reliance damages. When reliance damages are presented as an alternative to expectation damages, insert an appropriate predicate, describing the circumstances under which the jury is to award reliance damages, so that the jury understands that it is not to award both.

Substitute the appropriate party designations for the party terms in brackets, or insert the parties' names. Use either "promise" or "conduct," depending upon the circumstances of the case.

COMMENT

This instruction may be appropriate when the contract that is breached is based upon promissory estoppel. See RCM Supply Co., Inc. v. Hunter Douglas, Inc., 686 F.2d 1074, 1078–79 (4th Cir. 1982). See also Silverdale Hotel Associates v. Lomas & Nettleton Co., 36 Wn.App. 762, 677 P.2d 773 (1984).

Reliance damages may also be appropriate when lost profits cannot be proved with reasonable certainty, or do not exist. See Restatement (Second) of Contracts § 346 (1981); Farm Crop Energy, Inc. v. Old Nat. Bank of Washington, 109 Wn.2d 923, 750 P.2d 231 (1988) (plaintiff limited to reliance damages on basis of "new business rule").

As an alternative to the measure of damages stated in § 347 [bene-

fit of bargain], the injured party has a right to damages based on his reliance interest, including expenditures made in preparation for performance, less any loss that the party in breach can prove with reasonable certainty the injured party would have suffered had the contract been performed.

Restatement (Second) of Contracts § 349 (1981).

For a detailed discussion of damages issues, see DeWolf, Allen, and Caruso, 25 Washington Practice, Contract Law and Practice, Ch. 14 (3d ed.).

[Current as of September 2018.]

WPI 303.06

CONTRACT—MITIGATION OF DAMAGES

A [plaintiff] who sustains damage as a result of a [defendant's] breach of contract has a duty to minimize [his] [her] [its] loss. The [plaintiff] is not entitled to recover for any part of the loss that [he] [she] [it] could have avoided with reasonable efforts. The [defendant] has the burden to prove the [plaintiff's] failure to use reasonable efforts to minimize [his] [her] [its] loss, and the amount of damages that could have been minimized or avoided.

[[The plaintiff] may recover expenses connected with reasonable efforts to avoid loss.]

NOTE ON USE

This instruction should be given in a contract case involving a claim of failure to mitigate damages. Compare WPI 33.01 (Avoidable Consequences—Personal Injury Generally). Use the last bracketed sentence when there is an evidentiary basis for awarding expenses of mitigation.

Party designations are placed in brackets to indicate that they should be changed when appropriate to the case. Often, the best solution will be to insert the names of the parties instead of their designations.

COMMENT

Restatement (Second) of Contracts § 350 (1981), entitled "Avoidability as a Limitation on Damages," provides:

> (1) Except as stated in Subsection (2), damages are not recoverable for loss that the injured party could have avoided without undue risk, burden or humiliation.
>
> (2) The injured party is not precluded from recovery by the rule stated in Subsection (1) to the extent that he has made reasonable but unsuccessful efforts to avoid loss.

See also Pub. Util. Dist. No. 2 of Pacific County v. Comcast of Washington IV, Inc., 184 Wn.App. 24, 336 P.3d 65 (2014), review denied 183 Wn.2d 1015 (2015) (trial court properly denied reduction based on alleged failure to mitigate damages).

In appropriate cases, the pattern instruction may need to be modified to refer to the "undue risk, burden or humiliation" language from the Restatement (Second)'s subsection (1), or to the "reasonable but unsuccessful efforts to avoid loss" language from the Restatement (Second)'s subsection (2).

The party alleging that the damages should have been mitigated has the burden of proof on the issue. Pub. Util. Dist. No. 2 of Pacific County v. Comcast of Washington IV, Inc., 184 Wn.App. 24, 336 P.3d 65 (2014), review denied 183 Wn.2d 1015 (2015); Robblee v. Robblee, 68 Wn.App. 69, 841 P.2d 1289 (1992).

The duty to mitigate will not arise, or may be suspended, if there is a basis for a reasonable belief by the injured party that the breaching party will perform. See cases involving repeated promises to perform, e.g., Sears, Roebuck & Co. v. Grant, 49 Wn.2d 123, 298 P.2d 497 (1956); Beeson Bros. v. Chambers, 155 Wash. 564, 285 P. 433 (1930).

The injured party is entitled to recover expenses associated with reasonable efforts to mitigate damages. Family Medical Bldg., Inc., v. Dept. of Soc. & Health Services, 104 Wn.2d 105, 702 P.2d 459 (1985) (landlord's expenses of remodeling specialized premises in order to relet); City of Puyallup v. Hogan, 168 Wn.App. 406, 277 P.3d 49 (2012) (trial court properly rejected landlord's defense of failure to mitigate based on tenant's declining to renew lease after condemnation).

For a detailed discussion of damages issues, see DeWolf, Allen, and Caruso, 25 Washington Practice, Contract Law and Practice, Ch. 14 (3d ed.).

[Current as of September 2018.]

WPI 303.07

CONTRACT—LIQUIDATED DAMAGES

The parties to a contract may provide in advance for the amount of damages that are to be paid in the event of a breach. These damages are known as "liquidated damages."

In this case, the parties have agreed that if you find a breach of contract [by (insert party)**], you are to award liquidated damages in the amount of** (insert amount)**.**

NOTE ON USE

Use this instruction when the court has determined that there is an applicable, enforceable liquidated damage clause. Use the bracketed phrase, with elaboration if necessary, if the clause is applicable to a particular breach and more than one breach is at issue.

COMMENT

Liquidated damage clauses are favored in Washington and will be upheld if the amounts involved do not amount to a penalty or are not otherwise unlawful. Watson v. Ingram, 124 Wn.2d 845, 850, 881 P.2d 247 (1994); Buchanan v. Kettner, 97 Wn.App. 370, 984 P.2d 1047 (1999).

A liquidated damage clause is enforceable as long as it is a "reasonable forecast of just compensation" and the proof of loss will be impossible or very difficult. Watson v. Ingram, 124 Wn.2d 845, 850, 881 P.2d 247 (1994); Lee v. Bergesen, 58 Wn.2d 462, 464, 364 P.2d 18 (1961). A liquidated damage clause that does not meet these tests will be found to be unenforceable as a penalty for breach. See Restatement (Second) of Contracts § 356 (1981).

The reasonableness of the loss is measured against what could have been anticipated at the time of the making of the contract, rather than as against the actual loss. Restatement (Second) of Contracts, § 356, comment b (1981). The greater the difficulty in anticipating the amount of loss at the time the contract is made, the greater the range which will be judged to be "reasonable" as of that time. Watson v. Ingram, 124 Wn.2d at 853.

For a detailed discussion of damages issues, see DeWolf, Allen, and Caruso, 25 Washington Practice, Contract Law and Practice, Ch. 14 (3d ed.).

[Current as of September 2018.]

WPI 303.08

CONTRACT—DAMAGES—RESTITUTION

If you find (insert required predicate, such as quasi contract or quantum meruit, cancellation of contract, etc.), **then in order to prevent unjust enrichment of the [defendant], [plaintiff] is entitled to restitution, or the restoration of any benefit conferred on the [defendant].**

This means that the [plaintiff] is entitled to the reasonable value to the [defendant] of the [services rendered] [goods delivered] [property conveyed] to the [defendant] [subtracting the reasonable value of any performance received by the plaintiff]. [You may consider, but are not bound by, the contract price as evidence of the value of the [services] [goods] [property].]

NOTE ON USE

Use this instruction when restitution is an appropriate measure of damages, and the judge has elected to submit the issue to the jury. See the Comment below. Substitute the injured party for the bracketed plaintiff, and the party receiving the benefit or unjust enrichment for the bracketed defendant. Use the last bracketed sentence when restitution is sought in lieu of an unenforceable or cancelled contract.

This instruction may appropriately be combined with WPI 301A.02 (Quasi Contract), but it may also be used as an alternative remedy for breach of contract; see the Comment below.

COMMENT

Although generally an equitable remedy, the court may elect to submit the issue to a jury because there is a mixture of equitable and legal issues in the case, or in order to obtain an advisory ruling.

The Restatement (Second) of Contracts defines a party's "restitution interest" as its interest in "having restored to [it] any benefit that [it] has conferred on the other party." Restatement (Second) of Contracts § 370 comment a (1981). Quantum meruit, literally "what he deserves," or a reasonable amount for work done, is the appropriate measure of restitution in return for services rendered. In appropriate circumstances, it may include a reasonable profit. Heaton v. Imus, 93 Wn.2d

249, 252, 608 P.2d 631 (1980). The Restatement (Second) of Contracts, section 371 defines the value to the other party as either (a) the value in terms of what it would have cost the other party to obtain the benefit from someone in the claimant's position, or (b) the extent to which the value of the other party's property or interest has been increased.

Quasi contract/Unjust enrichment. "Restitution" has been described as:

> the modern designation for the older doctrine of "quasi-contracts." "Quasi-contracts" are not true contracts but are obligations created by the law when money or property has been placed in one person's possession, under such circumstances that in equity and good conscience, he ought not to retain it.

Bill v. Gattavara, 34 Wn.2d 645, 650, 209 P.2d 457 (1949); see Davenport v. Washington Educ. Ass'n, 147 Wn.App. 704, 197 P.3d 686 (2008) (retention by teachers' union of agency-shop fees deducted from salaries of nonmembers in order to finance political expenditures gave rise to claim for restitution).

This obligation may be contrary to the intention of either one, or both, of the parties. Chandler v. Washington Toll Bridge Authority, 17 Wn.2d 591, 601, 137 P.2d 97 (1943).

A person confers a "benefit" upon another if he or she: performs services beneficial to, or at least at the request of, the other; gives to the other possession of or interest in money, land, chattels or choses in action; or, satisfies a debt or duty of the other; or in any way adds to the security or advantage of the other. Chandler v. Washington Toll Bridge Authority, 17 Wn.2d at 602–03. Nevertheless, even when a person has received a benefit from another, he or she is only liable to pay for it when the circumstances are such that between the two, it is "unjust" to retain it without paying restitution. Chandler v. Washington Toll Bridge Authority, 17 Wn.2d at 601.

Recovery in quantum meruit was denied when the plaintiff had performed services under a contingent contract with another, with benefits incidentally conferred upon the defendant. The plaintiff did not receive payment for the services when the contingency did not materialize, but that was a risk for which he had contracted. Chandler v. Washington Toll Bridge Authority, 17 Wn.2d 591, 601, 137 P.2d 97 (1943). Quantum meruit has been allowed when one party's performance occurs in the absence of a contract, Losli v. Foster, 37 Wn.2d 220, 222 P.2d 824 (1950), or when a substantial change not within the contemplation of the parties occurs with a resulting benefit to one and expense to the other. Heaton v. Imus, 93 Wn.2d 249, 608 P.2d 631 (1980).

Alternate remedy for breach. In a pre-U.C.C. case, the court found that a buyer of a product that is not as warranted by the seller may elect to rescind the contract, refuse the product, and recover any money paid on the purchase price, or in freight, in restitution. This is an alternative remedy to accepting the product and offsetting the purchase price with damages resulting from the breach. Houser & Haines Mfg. Co. v. McKay, 53 Wash. 337, 101 P. 894 (1909).

Restitution is not available for breach of a fully performed contract when the only outstanding performance is the payment of money. Restatement (Second) of Contracts § 373(2) (1981); Kofmehl v. Baseline Lake, LLC, 177 Wn.2d 584, 305 P.3d 230 (2013) (trial court erroneously dismissed claim for return of earnest money when evidence conflicted as to whether vendor was ready, willing, and able to perform). The basic aim of restitution is to place the plaintiff in the same economic position as he or she enjoyed prior to contracting. DeWolf, Allen, and Caruso, 25 Washington Practice, Contract Law and Practice, § 14:7 (3d ed.).

For a detailed discussion of damages issues, see DeWolf, Allen, and Caruso, 25 Washington Practice, Contract Law and Practice, Ch. 14 (3d ed.). See also the Restatement (Third) of Restitution and Unjust Enrichment (2011).

[Current as of September 2018.]

PART XIV

CONSUMER PROTECTION

CHAPTER 310 CONSUMER PROTECTION ACTIONS

CHAPTER 310

CONSUMER PROTECTION ACTIONS

WPI 310.00 Consumer Protection Act—Introduction
WPI 310.01 Elements of a Violation of the Consumer Protection Act
WPI 310.02 Reasonableness Defense to Consumer Protection Act Claim
WPI 310.03 *Per Se* Violation of Consumer Protection Act
WPI 310.04 Public Interest Element
WPI 310.05 Public Interest Element in Private Disputes
WPI 310.06 Injury in Consumer Protection Act Claim
WPI 310.07 Causation in Consumer Protection Act Claim
WPI 310.08 Definition—Unfair or Deceptive Act or Practice
WPI 310.09 Definition—Trade or Commerce

WPI 310.00

CONSUMER PROTECTION ACT—INTRODUCTION

Coverage of chapter. These consumer protection instructions cover only cases brought under the unfair or deceptive acts or practices aspects of the Unfair Business Practices Act—Consumer Protection Act (CPA), RCW Chapter 19.86. Antitrust and unfair competition aspects of the statute are not addressed in these instructions.

Statutory development. The CPA, first enacted in 1961, is Washington's principal consumer protection and antitrust statute. The consumer protection provisions of the CPA were modeled after Section 5 of the Federal Trade Commission Act, 15 U.S.C.A. § 45. Most states now have such "Little FTC" acts. The heart of the consumer protection provisions of the CPA is RCW 19.86.020, which states: "Unfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce are hereby declared unlawful."

In its early form the CPA allowed only actions by the Attorney General on behalf of the state; the state has remedies available to it under RCW 19.86.080 and RCW 19.86.140.

The CPA was later amended to add further remedies. Private rights of action may now be maintained for recovery of actual damages, costs, and a reasonable attorney's fee. RCW 19.86.090. A private plaintiff may be eligible for treble damages: "[T]he court may, in its discretion, increase the award of damages up to an amount not to exceed three times the actual damages sustained." RCW 19.86.090 (capping such increased damages at $25,000 for violations of RCW 19.86.020).

A private plaintiff may also seek injunctive relief. RCW 19.86.090. The purpose of the private right of action is "to enlist the aid of private individuals . . . to assist in the enforcement of the [CPA]." Lightfoot v. MacDonald, 86 Wn.2d 331, 335–36, 544 P.2d 88 (1976). Private consumers may obtain injunctive relief, even if the injunction would not directly affect the individual's own rights. RCW 19.86.090; Hockley v. Hargitt, 82 Wn.2d 337, 349–50, 510 P.2d 1123 (1973). Thus, the private right of action serves the public interest by preventing unfair or deceptive practices from continuing unchecked. Hockley v. Hargitt, 82 Wn.2d at 350; see also Klem v. Wash. Mutual Bank, 176 Wn.2d 771, 295 P.3d 1179 (2013) (injunction against foreclosure trustee company restored on appeal).

A plaintiff in a private action under the CPA may also obtain rescission and other equitable remedies. Allen v. American Land Research, 95 Wn.2d 841, 851–52, 631 P.2d 930 (1981).

Elements. In Hangman Ridge Training Stables, Inc. v. Safeco Title Ins., Co., 105 Wn.2d 778, 780, 719 P.2d 531 (1986), the Supreme Court defined the elements of a private CPA "unfair or deceptive acts or practices" action:

> We hold that to prevail in a private CPA action . . . a plaintiff must establish five distinct elements: (1) unfair or deceptive act or practice; (2) occurring in trade or commerce; (3) public interest impact; (4) injury to plaintiff in his or her business or property; (5) causation.

See the discussion of these elements in the Comments to WPI 310.01 (Elements of a Violation of the Consumer Protection Act) and WPI 310.08 (Definition—Unfair or Deceptive Act or Practice).

***Per se* violations.** The Legislature periodically establishes *per se* violations of one or more elements of a CPA claim by declaring that a violation of a particular statute is a *per se* unfair or deceptive trade practice, which establishes the first two elements, or *per se* affects the public interest, which satisfies element (3), or both. See Hangman Ridge

Training Stable, Inc. v. Safeco Title Ins. Co, 105 Wn.2d at 792. Examples of such statutes are listed in the Comment to WPI 310.03 (*Per Se* Violation of Consumer Protection Act). See also WPI 320.07 (Violations of Insurance Regulations Related to Settlement of Claims as Unfair or Deceptive Acts Under the CPA—Third Party Claims/First Party Claims) for deceptive acts or practices by insurance companies.

A number of statutes that contain an "unfair trade or practice" and "public interest" declaration also contain a declaration that a violation "is not reasonable in relation to the development and preservation of business." See, e.g., RCW 19.170.010(2) (advertising prizes and promotions); RCW 46.71.070 (automotive repair); RCW 19.182.150 (Fair Credit Reporting Act); RCW 49.60.030(3) (Law Against Discrimination). For a list of statutes containing declarations relevant to the CPA, see Appendix H to these instructions. See also the list of cross-referenced statutes in the Code Reviser's notes at the beginning of RCW Chapter 19.86 (http://app.leg.wa.gov/RCW/default.aspx?cite=19.86).

Preemption. The Bankruptcy Appellate Court for the Ninth Circuit has held that the U.S. Bankruptcy Code pre-empts the Washington CPA. In re Chaussee, 399 B.R. 225, 229–34 (9th Cir. BAP 2008).

Insurance bad faith instructions. The WPI instructions regarding insurance bad faith, at WPI Chapter 320, are companions to these instructions, and bad faith by an insurer can be a *per se* violation of the CPA. See WPI 320.00 (Insurance Bad Faith—Introduction).

[Current as of September 2018.]

WPI 310.01

ELEMENTS OF A VIOLATION OF THE CONSUMER PROTECTION ACT

(Insert name of plaintiff) **claims that** (name of defendant) **has violated the Washington Consumer Protection Act. To prove this claim,** (name of plaintiff) **has the burden of proving each of the following propositions:**

(1) That (name of defendant) **engaged in an unfair or deceptive act or practice;**

(2) That the act or practice occurred in the conduct of (name of defendant)'s **trade or commerce;**

(3) That the act or practice affects the public interest;

(4) That (name of plaintiff) **was injured in either [its] [his] [her] business or [its] [his] [her] property, and**

(5) That (name of defendant)'s **act or practice was a proximate cause of** (name of plaintiff)'s **injury.**

If you find from your consideration of all of the evidence that each of these propositions has been proved, your verdict should be for (name of plaintiff) **[on this claim]. On the other hand, if any of these propositions has not been proved, your verdict should be for** (name of defendant) **[on this claim].**

NOTE ON USE

Use this instruction with WPI 21.01 (Meaning of Burden of Proof—Preponderance of Evidence). Use this instruction with WPI 310.02 (Reasonableness Defense to Consumer Protection Act Claim), if appropriate.

If the first two or the first three propositions may be proved by violation of a statute (for example, a Washington statute that makes a violation of that statute a *per se* violation of the Consumer Protection Act), use WPI 310.03 (*Per Se* Violation of Consumer Protection Act).

For a definition of the first proposition, when a statutory violation is not alleged, use WPI 310.08 (Definition—Unfair or Deceptive Act or Practice). For an explanation of trade or commerce in the second proposition, use WPI 310.09 (Definition—Trade or Commerce).

Use optional WPI 310.06 (Injury in Consumer Protection Act Claim), if further explanation of "injured" in the fourth element is necessary or helpful.

For a discussion of causation, see the Comment to WPI 310.07 (Causation in Consumer Protection Act Claim).

COMMENT

In Hangman Ridge Training Stables, Inc. v. Safeco Title Ins. Co., 105 Wn.2d 778, 787–93, 719 P.2d 531 (1986), the court set forth the five elements of a Consumer Protection Act claim: (1) an unfair or deceptive act or practice; (2) in trade or commerce; (3) public interest; (4) injury to business or property; and (5) causation.

The term "unfair or deceptive" is not otherwise defined in the Act. RCW 19.86.020. In many cases, however, the first element will be met by a statutory violation. See WPI 310.03 (*Per Se* Violation of Consumer Protection Act). Regarding the requirements of a factual proof, see the Comment to WPI 310.08 (Definition—Unfair or Deceptive Act). No intentional deception need be proved, only a capacity or tendency to deceive. State v. A.N.W. Seed Corp., 116 Wn.2d 39, 50, 802 P.2d 1353 (1991); Hangman Ridge, 105 Wn.2d at 785, 719 P.2d 531.

When the underlying facts are undisputed, the question whether the acts are likely to deceive—an objective inquiry—is a question of law. State v. Mandatory Poster Agency, Inc., 199 Wn.App. 506, 512, 398 P.3d 1271, review denied 189 Wn.2d 1021 (2017). However, whether such a deception has the capacity to reach a substantial portion of the public is a question of fact precluding summary judgment, unless the undisputed facts establish that capacity. State v. Mandatory Poster Agency, Inc., 199 Wn.App. at 512.

With regard to unfairness, "an act or practice can be unfair without being deceptive." Klem v. Washington Mutual Bank, 176 Wn.2d 771, 787, 295 P.3d 1179 (2013).

If it is undisputed that the "trade or commerce" element is satisfied, the parties should stipulate that the element is met or the court should so rule, and the jury should be so instructed. If there is an issue regarding this element, give instruction WPI 310.09 (Definition—Trade or Commerce).

The third element, "public interest," is governed by RCW 19.86.093.

The statutory language defining "public interest" is set forth in WPI 310.04 (Public Interest Element).

The "business or property" injury in the fourth element may need the additional explanation of optional WPI 310.06 (Injury in a Consumer Protection Act Claim).

The causation requirement in the fifth element is proximate causation. Indoor Billboard/Wash., Inc., v. Integra Telecom of Wash., Inc., 162 Wn.2d 59,170 P.3d 10 (2007); Wash. State Physicians Ins. Exch. & Ass'n. v. Fisons Corp., 122 Wn.2d 299, 314, 858 P.2d 1054 (1993). Causation is addressed in WPI 310.07 (Causation in Consumer Protection Act Claim).

These instructions are intended for "unfair or deceptive acts or practices" cases; they may not be suitable for "unfair methods of competition" cases. RCW 19.86.020. Compare Nordstrom, Inc. v. Tampourlos, 107 Wn.2d 735, 733 P.2d 208 (1987) (implied overruling on other grounds recognized in Matsyuk v. State Farm Fire & Cas. Co., 173 Wn.2d 643, 659, 272 P.3d 802 (2012)), with Boeing Co. v. Sierracin Corp., 108 Wn.2d 38, 738 P.2d 665 (1987) (differing as to whether *Hangman Ridge* should be applied to unfair competition cases).

The Consumer Protection Act must be liberally construed to protect the public. RCW 19.86.920. However, the CPA is not intended to prohibit acts or practices that are "reasonable in relation to the development and preservation of business." RCW 19.86.920. See WPI 310.02 (Reasonableness Defense to Consumer Protection Act Claim) and its Comment.

[Current as of September 2018.]

WPI 310.02

REASONABLENESS DEFENSE TO CONSUMER PROTECTION ACT CLAIM

The Consumer Protection Act does not prohibit acts or practices that are reasonable in relation to the development and preservation of business or that are not injurious to the public interest.

NOTE ON USE

Use with WPI 310.01 (Elements of a Violation of the Consumer Protection Act), if appropriate.

Use the instruction cautiously. It does not apply in every case, and jurors may have difficulty integrating it with the other instructions on this claim. See the Comment below.

COMMENT

This instruction is based on RCW 19.86.920. The instruction has been simplified so as to use the phrase "does not prohibit," rather than the statutory phrase "shall not be construed to prohibit." No substantive change is intended.

RCW 19.86.920 does not specify who bears the burden of proving reasonableness. The statute gives no indication whether reasonableness is an affirmative defense, a simple defense, or something else. Case law refers to reasonableness as a defense but has not addressed the burden of proof. See Travis v. Wash. Horse Breeders Ass'n, 111 Wn.2d 396, 408–09, 759 P.2d 418 (1988); Stephens v. Omni Ins. Co., 138 Wn.App. 151, 170, 159 P.3d 10 (2007), affirmed on different issues in Panag v. Farmers Ins. Co. of Washington, 166 Wn.2d 27, 204 P.3d 885 (2009); Cox v. Lewiston Grain Growers, 86 Wn.App. 357, 373, 936 P.2d 1191 (1997). Because of this uncertainty, the instruction does not include a burden of proof. Absent a burden of proof, jurors may find it difficult to fit the instruction into the framework of the plaintiff's required elements.

Jurors may also have difficulty balancing the policy interests involved in this instruction. In most cases, this difficulty can be avoided because the issue of reasonableness will be decided by the judge as a matter of law during pre-trial motions. See, e.g., Univ. of Washington v. Gov't. Employees Ins. Co., 200 Wn.App. 455, 404 P.3d 559 (2017). In some cases, however, material issues of fact will exist that need to be submitted to the jury. See Stephens v. Omni Ins. Co., 138 Wn.App. at 170; Travis v. Wash. Horse Breeders Ass'n, 111 Wn.2d at 408–09.

Defenses to the CPA must be read in conjunction with the language in RCW 19.86.920 directing courts to liberally construe the CPA. When the Legislature calls for a statute to be liberally construed, its exemptions must be narrowly confined. Vogt v. Seattle-First Nat'l Bank, 117 Wn.2d 541, 552, 817 P.2d 1364 (1991).

A number of statutes that contain an "unfair trade or practice" and "public interest" declaration also contain a declaration that a violation "is not reasonable in relation to the development and preservation of business." See, e.g., RCW 19.170.010(2) (advertising prizes and promotions); RCW 46.71.070 (automotive repair); RCW 19.182.150 (Fair Credit Reporting Act); RCW 49.60.030(3) (Law Against Discrimination). For a list of statutes containing declarations relevant to the CPA, see Appendix H to these instructions. See also the list of cross-referenced statutes in the Code Reviser's notes at the beginning of RCW Chapter 19.86 (http://app.leg.wa.gov/RCW/default.aspx?cite=19.86).

[Current as of September 2018.]

WPI 310.03

PER SE VIOLATION OF CONSUMER PROTECTION ACT

A violation of the statute relating to (briefly describe the statute's subject matter) **is an unfair or deceptive act or practice in the conduct of** (name of defendant)'s **trade or commerce. [A violation of this statute also affects the public interest.]**

This statute provides as follows:

(Insert a brief description of the requirements of the statute.)

If you find that a violation of this statute has occurred, then you must find that the first [two] [three] elements of a Consumer Protection Act violation have been proved.

NOTE ON USE

Use when the plaintiff alleges violation of a statute or regulation that is, by its terms, a *per se* violation of the Consumer Protection Act.

When a statute declares that its violation constitutes an unfair or deceptive act or practice, use the first sentence of the instruction. When the statute also contains a declaration that violation of the statute affects the public interest, use the bracketed sentence, and "three elements" in the last paragraph of the instruction. In the less common situation when the statute has a *per se* violation provision but no public interest declaration, use the alternative for two elements. In the uncommon situation when the statute contains only a public interest declaration, use only the bracketed alternative, and adjust the final paragraph accordingly.

See the Comment below for examples of statutes with such declarations. For *per se* violations of the CPA by violation of insurance regulations, use WPI 320.07 (Violation of Insurance Regulations Related to Settlement of Claims as Unfair or Deceptive Acts Under the CPA—Third Party Claims/First Party Claims).

COMMENT

Under Hangman Ridge Training Stables, Inc. v. Safeco Title Ins.

Co., 105 Wn.2d 778, 786, 719 P.2d 531 (1986), there are two types of statutory declarations that might constitute a *per se* violation of elements of the Consumer Protection Act: (a) a "*per se* unfair trade practice . . . when a statute has been declared by the Legislature to constitute an unfair or deceptive act in trade or commerce," or "unfair trade practice," satisfying the first two elements of a CPA cause of action, and (b) a separate public interest declaration, satisfying the third element. See WPI 310.01 (Elements of a Violation of the Consumer Protection Act). See also Wright v. Lyft, Inc., 189 Wn.2d 718, 406 P.3d 1149 (2017); Campbell v. Seattle Engine Rebuilders & Remfg., Inc., 75 Wn.App. 89, 876 P.2d 948 (1994) (public interest requirement must be met independently).

Examples of statutes with both an "unfair or deceptive act or practice in trade or commerce" declaration and a "public interest" declaration are: RCW 18.11.260 (auctions); RCW 19.158.010 and .030 (commercial telephone solicitation); RCW 19.170.010 (advertising prizes and promotions); RCW 19.182.150 (Fair Credit Reporting Act); RCW 19.250.040 (personal wireless numbers); RCW 26.33.400(3) (adoption advertising); RCW 31.45.190 (check cashers); RCW 46.70.310 (formerly Unfair Motor Vehicle Practices—Dealers' Licenses); RCW 46.71.070 (automotive repair); RCW 49.60.030(3) (discrimination, civil rights); and RCW 63.10.050 (consumer leases of motor vehicles). See also RCW 80.36.400(3) and its legislative finding in Laws of 1986, Chapter 281 (automatic dial answer services).

Examples of statutes with only an "unfair or deceptive act or practice" declaration include: RCW 18.185.210 (bail bond agents); RCW 19.16.440 (collection agencies); RCW 19.100.190 (franchises); RCW 19.110.170 (business opportunity fraud); RCW 19.134.070(5) (credit service agencies); RCW 19.275.040 (pyramid schemes); and RCW 64.36.330 and .170 (time share sales).

A number of statutes that contain an "unfair trade or practice" and "public interest" declaration also contain a declaration that a violation "is not reasonable in relation to the development and preservation of business." See, e.g., RCW 19.170.010(2) (advertising prizes and promotions); RCW 19.182.150 (Fair Credit Reporting Act); RCW 46.71.070 (automotive repair); RCW 49.60.030(3) (Law Against Discrimination). For a list of statutes containing declarations relevant to the CPA, see Appendix H to these instructions. See also the list of cross-referenced statutes in the Code Reviser's notes at the beginning of RCW Chapter 19.86 (http://app.leg.wa.gov/RCW/default.aspx?cite=19.86).

[Current as of September 2018.]

WPI 310.04

PUBLIC INTEREST ELEMENT

An act or practice "affects the public interest" if the act or practice:

[violates (insert citation to statute that incorporates the Consumer Protection Act)**] [or]**

[violates (insert citation to statute that specifically declares a public interest impact)**] [or]**

[injured other persons] [or]

[had the capacity to injure other persons] [or]

[has the capacity to injure other persons].

NOTE ON USE

This instruction describes the ways that a plaintiff may prove the public interest element of a CPA action. See element (3) of WPI 310.01 (Elements of a Violation of the Consumer Protection Act).

Use bracketed material as applicable. When using one of the bracketed alternatives that calls for a statutory citation, practitioners will also need to set forth the statutory language. Depending on the level of detail that is needed, the statutory language may be included in this instruction or in a separate instruction.

COMMENT

RCW 19.86.093.

The statute, enacted in 2009, sets forth five ways that a plaintiff may prove the public interest element in consumer protection actions. The statute provides:

> In a private action in which an unfair or deceptive act or practice is alleged under RCW 19.86.020, a claimant may establish that the act or practice is injurious to the public interest because it:
>
> (1) Violates a statute that incorporates this chapter;
>
> (2) Violates a statute that contains a specific legislative declaration of public interest impact; or

(3) (a) Injured other persons; (b) had the capacity to injure other persons; or (c) has the capacity to injure other persons.

[Current as of September 2018.]

WPI 310.05

PUBLIC INTEREST ELEMENT IN PRIVATE DISPUTES

(WITHDRAWN)

COMMENT

Previously, this instruction addressed the public interest element for private disputes, while former WPI 310.04 addressed the same element for consumer disputes. In 2009, the Legislature enacted RCW 19.86.093, which set forth a "public interest" test and effectively removed the distinction between private and consumer disputes. Accordingly, the statutory test has been incorporated into WPI 310.04 (Public Interest Element).

[Current as of September 2018.]

WPI 310.06

INJURY IN CONSUMER PROTECTION ACT CLAIM

(Insert name of plaintiff) **has suffered an "injury" if [his] [her] [its] business or property has been injured to any degree. Under the Consumer Protection Act,** (name of plaintiff) **has the burden of proving that [he] [she] [it] has been injured, but no monetary amount need be proved and proof of any injury is sufficient, even if expenses or losses caused by the violation are minimal.**

[Injuries to business or property do not include physical injury to a person's body, or pain and suffering.]

[Injuries to business or property, if any, include: [financial loss] [loss of professional business reputation] [loss of goodwill] [difficulty in securing a loan or other credit] [time away from work] [(insert other applicable type of injury to business or property)**] [inability to tend to business establishment].]**

NOTE ON USE

This is an optional instruction to be used when the jury would benefit from a supplemental instruction on the definition of "injury to business or property." Add the bracketed language of the second and third paragraphs if there is evidence to support its use.

COMMENT

Under Washington's Consumer Protection Act, injury is separate from damages, therefore quantifiable monetary loss is not required. Frias v. Asset Foreclosure Servs., Inc., 181 Wn.2d 412, 431, 334 P.3d 529 (2014).

In Hangman Ridge Training Stables, Inc. v. Safeco Title Ins. Co., 105 Wn.2d 778, 792, 719 P.2d 531 (1986), the court discussed the nature of injury to "business or property." See RCW 19.86.020. Non-quantifiable injuries such as loss of good will are sufficient to establish the required injury; even minimal damages are sufficient. Torres v. Mercer Canyons Inc., 835 F.3d 1125, 1135–36 (9th Cir. 2016) (failure to disclose certain job opportunities created sufficient grounds for CPA claim); Mason v.

Mortgage Am., Inc., 114 Wn.2d 842, 792 P.2d 142 (1990) (injury as result of loss of use of property); Handlin v. On-Site Manager, Inc., 187 Wn.App 841, 849–51, 351 P.3d 226 (2015) (withholding credit report used to deny rental housing is injury); Sorrel v. Eagle Healthcare, 110 Wn.App. 290, 298, 38 P.3d 1024 (2002) (injury by delay in refund of money).

"Injury" includes the costs of investigation, and the time needed to conduct that investigation, in response to a defendant's misleading communication about amounts owed to the defendant. Panag v. Farmers Ins. Co., 166 Wn.2d 27, 40, 57–65, 204 P.3d 885 (2009); see also Stephens v. Omni Ins. Co., 138 Wn.App. 151, 159 P.3d 10 (2007), affirmed on different issues in Panag v. Farmers Ins. Co. of Washington, 166 Wn.2d 27, 204 P.3d 885 (2009) (loss of time and expense of investigating validity of claim qualify as injury to business or property).

"Injury" also includes an insured's settlement agreement, even if it includes a covenant not to execute, as the agreement can impair the insured's credit rating or lead to damage to reputation and loss of business opportunities. Moratti v. Farmers Ins. Co., 162 Wn.App. 495, 254 P.3d 939 (2011). See also Williams v. Lifestyle Lift Holdings, Inc., 175 Wn.App 62, 73–74, 302 P.3d 523 (2013) (cost of surgery even if performed competently is injury, if surgery undertaken because of deceptive marketing).

On the other hand, expenses of litigating a personal injury claim do not constitute "injury." Panag v. Farmers Ins. Co., 166 Wn.2d 27, 40, 41, 204 P.3d 885 (2009). For further discussion of injuries to business or property, see DeWolf & Allen, 16 Washington Practice, Tort Law & Practice § 8.8 (4th ed.).

While the injury to business or property involved in a claim under the Washington Consumer Protection Act (CPA) need not be great, some injury must be established. Cousineau v. Microsoft Corp., 992 F.Supp.2d 1116, 1128 (W.D. Wash. 2012) (smart phone user's allegation that phone manufacturer's unauthorized transmission of data to its server caused a diminution in users' data plans was too nebulous to demonstrate injury absent an allegation the user paid a wireless carrier for a finite allowance rather than an unlimited usage plan).

Pain and suffering are "personal injuries" as opposed to injuries to "business or property." Personal injuries are not compensable damages under the Consumer Protection Act. Ambach v. French, 167 Wn.2d 167, 216 P.3d 405 (2009); White River Estates v. Hiltbrunner, 134 Wn.2d 761, 765 n.1, 953 P.2d 796 (1998); Wash. State Physicians Ins. Exch. & Ass'n v. Fisons Corp., 122 Wn.2d 299, 318, 858 P.2d 1054 (1993).

The court has discretion to treble the plaintiff's damages: "[T]he

court may, in its discretion, increase the award of damages up to an amount not to exceed three times the actual damages sustained." RCW 19.86.090 (capping such increased damages at $25,000 for violations of RCW 19.86.020).

[Current as of September 2018.]

WPI 310.07

CAUSATION IN CONSUMER PROTECTION ACT CLAIM

(Insert name of plaintiff) **has the burden of proving that** (name of defendant)'s **unfair or deceptive act or practice was a proximate cause of** (name of plaintiff)'s **injury.**

"Proximate cause" means a cause which in direct sequence [unbroken by any new independent cause] produces the injury complained of and without which such injury would not have happened.

[There may be one or more proximate causes of an injury.]

NOTE ON USE

Use this instruction to explain causation. If multiple causation is an issue, see the Comment below. Use bracketed material as applicable.

Use with WPI 24.05 (Presumptions—Rebuttable Mandatory—Which Affect the Burden of Proof (When Presumed Fact Constitutes a Jury Question)) if applicable. See Comment below for further discussion.

COMMENT

The Washington Supreme Court has approved of WPI 15.01 (Proximate Cause—Definition) and WPI 310.07 as accurate proximate cause instructions for use in CPA cases. Schnall v. AT&T Wireless Servs., Inc., 171 Wn.2d 260, 277–80, 259 P.3d 129 (2011), relying on Indoor Billboard/Wash., Inc. v. Integra Telecom of Wash., Inc., 162 Wn.2d 59, 83–84, 170 P.3d 10 (2007); see also Wash. State Physicians Ins. Exch. & Ass'n v. Fisons Corp., 122 Wn.2d 299, 314, 858 P.2d 1054 (1993) (upholding a jury instruction that required proof that the defendant's unfair or deceptive act proximately caused injury to the plaintiff's business or property).

The traditional definition of "proximate cause" in WPI 15.01 (Proximate Cause—Definition) is incorporated in this instruction. For alternative definitions of "proximate cause," see WPI Chapter 15 (Proximate Cause).

Substantial factor test. The Court of Appeals rejected a jury

instruction using the "substantial factor" test for causation in a CPA trial when there was no showing of two inseparable causes. See Sharbono v. Universal Underwriters Ins. Co., 139 Wn.App. 383, 161 P.3d 406 (2007).

Causal link. The required causal link is between the defendant's deceptive act and the plaintiff's injury. Schnall v. AT&T Wireless Srvcs., Inc., 171 Wn.2d 260, 277, 259 P.3d 129 (2011); Panag v. Farmers Ins. Co., 166 Wn.2d 27, 61, 204 P.3d 885 (2009); Schmidt v. Cornerstone Investments, Inc., 115 Wn.2d 148, 167, 795 P.2d 1143 (1990). This causal link is not necessarily broken by the existence of an intermediary between the plaintiff and the defendant. See Schmidt v. Cornerstone Investments, Inc., 115 Wn.2d at 167–68 (holding that the necessary causal link between a defendant's inflated property appraisal and the plaintiff's injury may still exist even if the defendant had no direct contact with the plaintiff).

Causation in cases involving affirmative misrepresentations. In cases involving affirmative misrepresentations of facts, the plaintiff is not required to show that he or she relied on the misrepresentations. The Supreme Court has "firmly rejected the principle that reliance is necessarily an element of the plaintiff's [CPA] case." Schnall v. AT&T Wireless Servs., Inc., 171 Wn.2d 260, 277, 259 P.3d 129 (2011); see Indoor Billboard/Wash., Inc. v. Integra Telecom of Wash., Inc., 162 Wn.2d 59, 78–84, 170 P.3d 10 (2007) (rejecting the former test of reliance/inducement, holding that the former test did not survive the *Hangman Ridge* case). Instead, the plaintiff is required to meet the general requirements of proximate causation: "We hold that the proximate cause standard embodied in WPI 15.01 is required to establish the causation element in a CPA claim." Schnall v. AT&T Wireless Services, Inc., 171 Wn.2d at 278; Indoor Billboard/Wash., Inc. v. Integra Telecom of Wash., Inc., 162 Wn.2d at 83–84.

According to both *Schnall* and *Indoor Billboard*, a plaintiff does not meet the test of proximate causation merely by showing that the defendant made an affirmative misrepresentation and that the plaintiff thereafter purchased the defendant's product or services. Schnall v. AT & T Servs., 171 Wn.2d at 277; Indoor Billboard/Wash., Inc. v. Integra Telecom of Wash., Inc., 162 Wn.2d at 83–84. Rather, the plaintiff must show that the plaintiff's injury would not have occurred but for the defendant's misrepresentation, and that the injury occurred in a direct causal sequence with the misrepresentation.

Causation in cases involving failure to disclose facts. In *Indoor Billboard*, the Supreme Court in several instances distinguished affirmative misrepresentations from failures to disclose facts, apparently limiting its holding to cases involving affirmative misrepresentations. Likewise, *Schnall* involved affirmative

misrepresentations. Because of the difficulty in proving reliance in a failure to disclose case, the Court of Appeals adopted a rebuttable presumption of reliance under the CPA for omissions of material facts claims, citing rebuttable presumptions of reliance applied by federal courts in CPA failure to disclose cases and adopted by the Washington Supreme Court in franchise fraud and security fraud cases. Deegan v. Windemere Real Estate/Center-Isle, Inc., 197 Wn.App. 875, 885–86, 890, 391 P.3d 582 (2017).

No case has clearly addressed whether the rebuttable presumption of reliance is resolved by the trial court as a matter of law, or by the jury through an instruction, thereby shifting the burden of production and persuasion to the defendant as a question of fact. Cf. Spivey v. City of Bellevue, 187 Wn.2d 716, 734–35, 389 P.3d (2017) (holding jury properly instructed on rebuttable presumption shifting burden of production and persuasion to defendant where plaintiff otherwise had "impossible burden" of demonstrating occupation actually caused disease); Mut. of Enumclaw Ins. Co. v. Dan Paulson Constr., Inc., 161 Wn.2d 903, 921, 169 P.3d 1 (2007) (holding defendant insurers bear the burden of proof on disproving harm once an insured plaintiff proves bad faith where insured otherwise would bear impossible burden of proving harm); Moratti v. Farmers Ins. Co. of Wash., 162 Wn.App. 495, 511, 254 P.3d 939 (2011) (jury instructed on rebuttable presumption of harm shifting burden of proof to defendant in insurance bad faith case).

Questions of fact/law. Usually, causation is a question of fact. See Indoor Billboard/Wash., Inc. v. Integra Telecom of Wash., Inc., 162 Wn.2d at 83–84; Carlile v. Harbour Homes, 147 Wn.App. 193, 214–15, 194 P.3d 280 (2008); Shah v. Allstate Ins. Co., 130 Wn.App. 74, 85–86, 121 P.3d 1204 (2005). If the links in the chain of causation show that the connection between defendant's act or practice and plaintiff's alleged injury is too remote, then lack of causation may be decided by the trial court as a matter of law. Fidelity Mortgage Corp. v. Seattle Times Co., 131 Wn.App. 462, 470–71, 128 P.3d 621 (2005). The test for remoteness is:

> (1) [W]hether there are more direct victims of the alleged wrongful conduct who can be counted on to vindicate the law as private attorneys general; (2) whether it will be difficult to ascertain the amount of the plaintiff's damages attributable to defendant's wrongful conduct, and (3) whether the courts will have to adopt complicated rules apportioning damages to obviate the risk of multiple recoveries.

Fidelity Mortgage Corp. v. Seattle Times Co., 131 Wn.App. at 470–71; see also Browne v. Avvo, Inc., 525 F. Supp.2d 1249, 1255 (W.D. Wash. 2007).

Multiple proximate causes. In negligence cases, when there is

evidence of more than one proximate cause, use of the article "a" is insufficient to inform the jury on the law of concurring negligence and multiple proximate causes, and it is error to use WPI 15.01 (Proximate Cause—Definition) without the bracketed sentence stating that an event may have one or more proximate causes. Jonson v. Chicago, Milwaukee, St. Paul and Pac. R.R. Co., 24 Wn.App. 377, 380, 601 P.2d 951 (1979).

See the Comment to WPI 15.01 (Proximate Cause—Definition). In particular, note that an instruction setting forth the legal effect of multiple proximate causes has been held to be necessary when both sides raise complex theories of multiple causation. Goucher v. J.R. Simplot Co., 104 Wn.2d 662, 709 P.2d 774 (1985); Brashear v. Puget Sound Power and Light Co., 100 Wn.2d 204, 667 P.2d 78 (1983). See also WPI 15.04 (Negligence of Defendant Concurring with Other Causes) for suggestions regarding the wording of an instruction on multiple causation.

[Current as of September 2018.]

WPI 310.08

DEFINITION—UNFAIR OR DECEPTIVE ACT OR PRACTICE

In order to prove that (name of defendant) **engaged in an unfair or deceptive act or practice, it is sufficient to show that the act or practice had the capacity to deceive a substantial portion of the public.** (Name of plaintiff) **does not need to show that the act or practice was intended to deceive.**

NOTE ON USE

Use this instruction in combination with WPI 310.01 (Elements of a Violation of the Consumer Protection Act) when the "unfair or deceptive" requirement is not met by a statutory violation.

The instruction defines deceptive acts or practices. For guidance in drafting an instruction that defines unfair acts or practices, see the Comment below.

COMMENT

The term "unfair or deceptive" is not defined in the Consumer Protection Act. RCW 19.86.020. Whether an alleged act constitutes an unfair or deceptive act or practice covered by the CPA is generally a question of law that appellate courts review under the de novo standard. Columbia Physical Therapy, Inc. v. Benton Franklin Orthopedic Assocs., P.L.L.C., 168 Wn.2d 421, 442, 228 P.3d 1260 (2010); Svendsen v. Stock, 143 Wn.2d 546, 553, 23 P.3d 455 (2001). It is a question of fact whether the defendant committed a specific action or practice. Leingang v. Pierce County Med. Bureau, 131 Wn.2d 133, 149–50, 930 P.2d 288 (1997).

Deceptive acts or practices. Whether an act has the capacity to deceive a substantial portion of the public is a question of fact. Behnke v. Ahrens, 172 Wn.App. 281, 294 P.3d 729 (2012). When the underlying facts are undisputed, the question whether the acts are likely to mislead - an objective inquiry - is a question of law. State v. Mandatory Poster Agency, Inc., 199 Wn.App. 506, 512, 398 P.3d 1271, review denied 189 Wn.2d 1021 (2017). However, whether such a deception has the capacity to reach a substantial portion of the public is a question of fact precluding summary judgment, unless the undisputed facts establish that capacity. State v. Mandatory Poster Agency, Inc., 199 Wn.App. at 512.

If the facts about a party's act or practice are not in dispute, the

trial court may decide whether that act or practice was deceptive as a matter of law. Smale v. Cellco P'ship, 547 F. Supp.2d 1181, 1188 (W.D. Wash. 2008); Leingang v. Pierce County Med. Bureau, 131 Wn.2d 133, 149–50, 930 P.2d 288 (1977).

Characterizing an insurance subrogation claim as a liquidated obligation that must be immediately paid, when in fact the claim and alleged debt had not yet been adjudicated, is an act that has a tendency to deceive a substantial portion of the public. Panag v. Farmers Ins. Co., 166 Wn.2d 27, 47–56, 204 P.3d 885 (2009). Listing a piece of real property and showing the property to potential buyers without disclosing that the property was previously used as a place for manufacturing methamphetamine is an act that has a tendency to deceive a substantial portion of the public. Bloor v. Fritz, 143 Wn.App. 718, 735–37, 180 P.3d 805 (2006) (the court also held that leaving this information out of the seller's disclosure statement could not serve as the basis of a claim under the CPA); see also Svendsen v. Stock, 143 Wn.2d 546, 553, 23 P.3d 455 (2001) (fraudulent concealment by real estate agent constituted a CPA violation).

The definition of "deceptive" involves an objective inquiry—would the practice be likely to mislead a reasonable or ordinary consumer. Behnke v. Ahrens, 172 Wn.App. 281, 292–93, 294 P.3d 729 (2012) (citing Panag v. Farmers Ins. Co., 166 Wn.2d at 50).

No intentional deception need be proved, only a tendency or capacity to deceive. Sing v. John L. Scott, Inc., 134 Wn.2d 24, 30, 948 P.2d 816 (1997); Hangman Ridge Training Stables, Inc. v. Safeco Title Ins. Co., 105 Wn.2d 778, 785, 719 P.2d 531 (1986). Similarly, a communication may contain accurate information and still be unfair or deceptive, if there is a representation, omission, or practice that is likely to mislead a reasonable consumer. In this way, a defendant's use of accurate information may fall within the CPA as being deceptive or unfair. Panag v. Farmers Ins. Co., 166 Wn.2d at 49–50; Columbia Physical Therapy, Inc. v. Benton Franklin Orthopedic Assocs., P.L.L.C., 168 Wn.2d at 442. See also Deegan v. Windermere Real Estate/Center-Isle Inc., 197 Wn.App. 875, 890, 391 P.3d 532 (2017) (even accurate information may be deceptive if there is a representation, omission or practice that is likely to mislead).

Unfair acts or practices. Although most consumer cases under the CPA focus on "deceptive" acts or practices, RCW 19.86.020 also prohibits acts or practices that are "unfair." The statute does not define "unfair," and Washington law has not yet defined the term. The WPI Committee sets out the following discussion to assist practitioners in developing their own instructional language in consumer cases.

In Klem v. Wash. Mut. Bank, 176 Wn.2d 771, 295 P.3d 1179 (2013), the Supreme Court held that "an act or practice can be unfair without

being deceptive." Klem v. Wash. Mut. Bank, 176 Wn.2d at 787. The court held that the "or" between "unfair" and "deceptive" in RCW 19.86.020 is "disjunctive," and consequently, that unfair acts or practices alone may satisfy the unfair or deceptive requirement. Klem v. Wash. Mut. Bank, 176 Wn.2d at 787. The court did not define an "unfair" act or practice, however, noting:

> " 'It is impossible to frame definitions which embrace all unfair practices. There is no limit to human inventiveness in this field. Even if all known unfair practices were specifically defined and prohibited, it would be at once necessary to begin all over again.' "

Klem v. Wash. Mut. Bank, 176 Wn.2d. at 786 (citations omitted).

The unfair practice in *Klem* that the court held sufficient to meet the "unfair" prong was a foreclosure trustee's practice of deferring to the lender on whether to postpone a foreclosure sale, and failing to exercise the independence required of an impartial trustee. Klem v. Wash. Mut. Bank, 176 Wn.2d at 792.

The court in *Klem* offered some guidance on how unfair acts under the CPA might be analyzed. After observing that the CPA is modeled on the Federal Trade Commission (FTC) Act and was intended to complement federal consumer protection law, the court in *Klem* stated that Washington courts may be guided by federal laws in this area, citing RCW 19.86.920. The court suggested that FTC law may be persuasive as a starting point for defining "unfair" acts or practices under the CPA. Klem v. Wash. Mut. Bank, 176 Wn.2d at 787–88. The court noted that under current FTC law a practice is "unfair" if it " 'causes or is likely to cause substantial injury to consumers which is not reasonably avoidable by consumers themselves and is not outweighed by countervailing benefits.' " Klem v. Wash. Mut. Bank, 176 Wn.2d at 787–88. (quoting 15 U.S.C.A. § 45(n)). See also Mellon v. Regional Trustee Servs. Corp., 182 Wn.App. 476, 487–491, 334 P.3d 1120 (2014).

The court in *Klem* also cited with approval Magney v. Lincoln Mut. Sav. Bank, 34 Wn.App. 45, 57, 659 P.2d 537 (1983), which held that an act is unfair under the CPA if it offends public policy as established "by statutes [or] the common law," or is "unethical, oppressive, or unscrupulous," among other things. Klem v. Wash. Mut. Bank, 176 Wn.2d at 786 (citing *Magney*). See also Mellon v. Regional Trustee Servs. Corp., 182 Wn.App. 476, 490, 334 P.3d 1120 (2014).

The *Mellon* court also stated that "advancing a substantively or procedurally unconscionable contract term is likely an 'unfair' act or practice." Mellon v. Regional Trustee Servs. Corp., 182 Wn.App. at 490 (citing State v. Kaiser, 161 Wn.App. at 705, 722, 254 P.3d 850 (2011), and State v. Ralph Williams' NW Chrysler Plymouth, Inc., 87 Wn.2d

298, 309, 553 P.2d 423 (1976)). Based on these definitions of "unfairness," the court held that the loan servicer's alleged conduct, if proven, was "unfair" and would justify relief under the CPA. Mellon v. Regional Trustee Servs. Corp., 182 Wn.App. at 491; see also Blake v. Federal Way Cycle Ctr., 40 Wn.App. 302, 310–11, 698 P.2d 578 (1985) (discussing "unfairness" standard under CPA in light of FTC standards, citing FTC v. Sperry & Hutchison Co., 405 U.S. 233, 244 n.5, 92 S.Ct. 898, 31 L.Ed.2d 170 (1972)).

Statutory violations. When the defendant's act or practice is alleged to be "unfair or deceptive" because of a statutory violation, see WPI 310.03 (*Per Se* Violation of Consumer Protection Act).

[Current as of September 2018.]

WPI 310.09

DEFINITION—TRADE OR COMMERCE

The phrase "trade or commerce" includes the sale of assets or services, and any commerce directly or indirectly affecting the people of the State of Washington. The word "assets" includes anything of value.

NOTE ON USE

Use this instruction with WPI 310.01 (Elements of a Violation of the Consumer Protection Act) only when "trade or commerce" is at issue.

COMMENT

RCW 19.86.010; see also Hangman Ridge Training Stables, Inc. v. Safeco Title Ins. Co., 105 Wn.2d 778, 785, 719 P.2d 531 (1986). If there is no material dispute of fact regarding the "trade or commerce" element, the parties should stipulate that the element is met or the judge should so rule, and this instruction should not be given.

Professional business services. In Michael v. Mosquera-Lacey, 165 Wn.2d 595, 602–03, 200 P.3d 695 (2009), the Washington Supreme Court held that the Consumer Protection Act applies to only the entrepreneurial activities that are part of professional service business (e.g., medical, legal, and dental practices). Examples of the "trade or commerce" part of a professional business include price-setting, marketing, and billing activities. Michael v. Mosquera-Lacey, 165 Wn.2d at 602–03; see also Ramos v. Arnold, 141 Wn.App. 11, 20, 169 P.3d 482 (2007).

Contrasted with entrepreneurial activities are the activities involved in providing the substantive professional services of the business practice, which are not covered under the CPA. For example, the CPA does not cover "a doctor's skills in examining, diagnosing, treating, or caring for a patient." Michael v. Mosquera-Lacey, 165 Wn.2d 595, 602–03, 200 P.3d 695 (2009) (citing Wright v. Jeckle, 104 Wn.App. 478, 16 P.3d 1268 (2001)).

It may not always be easy to distinguish professional and entrepreneurial services. For example, in *Wright*, the Court of Appeals held that a doctor who prescribes the weight-loss drug fen-phen to his patients can be engaged in entrepreneurial activity depending on the extent to which the doctor advertises, markets, and sells the drug; a doctor who is in the business of selling diet drugs would be subject to the CPA,

whereas a doctor who is practicing medicine would not. Wright v. Jeckle, 104 Wn.App. at 484–85; see also Young v. Savidge, 155 Wn.App. 806, 825–27, 230 P.3d 222 (2010) (factual question whether dentist demonstrated entrepreneurial motive by withholding information about using nickel in crowns when advertisement indicated gold, porcelain, or stainless steel).

Publishers. Publishing information does not necessarily constitute advertising in the course of trade or commerce. For example, the court in Fidelity Mortgage Corp. v. Seattle Times Co., 131 Wn.App. 462, 128 P.3d 621 (2005), held that the Seattle Times did not "advertise" when it published quarterly charts showing interest rates for mortgages. Because it was not an advertisement, this activity did not constitute "trade or commerce."

[Current as of September 2018.]

PART XV

INSURANCE BAD FAITH

CHAPTER 320 INSURANCE BAD FAITH ACTIONS

CHAPTER 320

INSURANCE BAD FAITH ACTIONS

WPI 320.00	Introduction
WPI 320.01	Insurer's Failure to Act in Good Faith—Burden of Proof—General
WPI 320.01.01	Insurer's Failure to Act in Good Faith—Burden of Proof—General—Third-Party Claims
WPI 320.02	Insurer's Duty of Good Faith—General Duty
WPI 320.03	Insurer's Failure to Act in Good Faith in Defending Subject to a Reservation of Rights
WPI 320.04	Insurer's Failure to Act in Good Faith—Denial of First-Party Claims
WPI 320.05	Insurer's Failure to Act in Good Faith—Failure to Investigate and Explore Settlement
WPI 320.06	Violations of Insurance Regulations Related to Settlement of Claims
WPI 320.06.01	Insurance Fair Conduct Act
WPI 320.07	Special Verdict Form—Insurer's Failure to Act in Good Faith

---

WPI 320.00

INTRODUCTION

Background. The duty to act in good faith owed by an insurer to an insured has been created judicially, Burnham v. Commercial Cas. Ins. Co., 10 Wn.2d 624, 117 P.2d 644 (1941), and legislatively, RCW 48.01.030, and implemented administratively by the Washington Administrative Code, WAC 284-30-300 et seq. Frequently, acts that constitute bad faith by an insurer will also be violations of the Consumer Protection Act, RCW Chapter 19.86. The courts have drawn freely from

any of these sources to justify findings of what is called "insurance bad faith," not always keeping the bases of their opinions clear. The law of insurance bad faith is still evolving in Washington. For detailed discussions of this area of the law, see Harris, Washington Insurance Law (3rd ed.) (especially Chapters 2 and 7 through 20), and DeWolf & Allen, 16A Washington Practice, Tort Law and Practice, Chapter 28 (4th ed.).

Nature of duty of good faith. An action for bad faith handling of an insurance claim sounds in tort. St. Paul Fire & Marine Ins. Co. v. Onvia, Inc., 165 Wn.2d 122, 196 P.3d 664 (2008); Woo v. Fireman's Fund Ins. Co., 150 Wn.App. 158, 208 P.3d 557 (2009). The duty has been held to require an insurer to use both good faith and reasonable care in handling insurance claims. Burnham v. Commercial Cas. Ins. Co., 10 Wn.2d 624, 117 P.2d 644 (1941). It arises out of the quasi-fiduciary duty between insurer and insured and the duty of good faith and fair dealing inherent in any contract. Safeco Ins. Co. v. Butler, 118 Wn.2d 383, 389, 823 P.2d 499 (1992); see also St. Paul Fire & Marine Ins. Co. v. Onvia, Inc., 165 Wn.2d at 129 (duty of good faith is based on a source "akin to a fiduciary duty"). Compare with WPI 302.11 (Implied Duty of Good Faith and Fair Dealing). This is not a true fiduciary duty, and the insurer is not strictly liable. Safeco Ins. Co. v. Butler, 118 Wn.2d 383, 389; Tyler v. Grange Ins. Ass'n, 3 Wn.App. 167, 473 P.2d 193 (1970).

The duty of good faith is enhanced in some cases, typically reservation of rights cases. See the discussion in the Comment to WPI 320.02 (Insurer's Duty of Good Faith—General Duty); but see Barstad v. Stewart Title Guar. Co, 145 Wn.2d 528, 542–43, 39 P.3d 984 (2002) (no *enhanced* duty in first-party cases involving preliminary title commitments); Ellwein v. Hartford Acc. & Indem. Co., 142 Wn.2d 766, 778–81, 15 P.3d 640 (2001) (no *enhanced* duty in UIM cases), overruled on other grounds in Smith v. Safeco Ins. Co., 150 Wn.2d 478, 78 P.3d 1274 (2003). See also Fortson-Kemmerer v. Allstate Ins. Co., 198 Wn.App. 387, 394–95, 398 P.3d 849 (2017), petition for review denied 189 Wn.2d 1039 (2018).

The duty of good faith applies to an insurance adjuster who is an employee. The adjuster may be found personally liable for violations of the duty of good faith and the Consumer Protection Act. Keodalah v. Allstate Ins. Co., 3 Wn.App.2d 31, 413 P.3d 1059 (2018), petition for review filed May 21, 2018; see also Merriman v. American Guarantee & Liability Ins. Co., 198 Wn.App. 594, 396 P.3d 351, review denied 189 Wn.2d 1038, 413 P.3d 565 (2017).

Third-party claimants. The common law duty to act in good faith is owed by the insurer to its insured, not to third-party claimants. Tank v. State Farm Fire & Cas. Co., 105 Wn.2d 381, 715 P.2d 1133 (1986). A third-party claimant cannot bring a bad faith claim unless the insured has assigned the claim to the third party, Planet Ins. Co. v. Wong, 74

Wn.App. 905, 877 P.2d 198 (1994), or unless the insurer owes a direct contractual obligation to the third party (such as the duty owed to intended beneficiaries under the insurance contract). See Leslie v. Fidelity Nat'l Title Ins. Co., 598 F.Supp.2d 1176, 1182–83 (W.D. Wash. 2009); Tank v. State Farm Fire & Cas. Co., 105 Wn.2d at 394–95.

Nor do third-party claimants have a cause of action for *per se* violations of the Consumer Protection Act (CPA) as defined by the Insurance Commissioner in WAC 284-30-330 (defining specific unfair claims practices applicable to the settlement of insurance claims). Industrial Indem. Co. v. Kallevig, 114 Wn.2d 907, 792 P.2d 520 (1990); Tank v. State Farm, 105 Wn.2d at 393, 394. The court, however, has left open the possibility that third-party claimants may have non-*per se* actions under the CPA. Transamerica Title Ins. Co. v. Johnson, 103 Wn.2d 409, 418, 693 P.2d 697 (1985).

Duties of insurer. The duty owed by an insurer arises in several distinct contexts, and the duty of good faith is defined differently depending on the particular context. Good faith duties stemming out of the broad duty to defend a third-party claim arising from liability insurance include:

1. The duty to defend;

2. The duty to investigate, negotiate, and explore settlement within policy limits; and

3. The enhanced duty owed when defending an insured under reservations of rights.

See DeWolf & Allen, 16A Washington Practice, Tort Law and Practice § 28.4 (4th ed.).

Insurers who deny coverage to insureds in bad faith under homeowners insurance, property damage coverage, health insurance, and the like are liable. In *Kallevig*, the court stated the duty to act in good faith arose at least in part from RCW 48.01.030, which provides:

> The business of insurance is one affected by the public interest, requiring that all persons be actuated by good faith, abstain from deception, and practice honesty and equity in all insurance matters. Upon the insurer, the insured, their providers, and their representatives rests the duty of preserving inviolate the integrity of insurance.

Duty to defend. For an overview of the general principles related to the insurer's duty to defend, see Am. Best Food, Inc. v. Alea London, Ltd. 168 Wn.2d 398, 229 P.3d 693 (2010). The opinion compares the

duty to defend with the narrower duty to indemnify, addresses events that trigger the duty to defend, analyzes the duty in the context of a policy exclusion, sets forth the insurer's standard of care, and discusses the rebuttable presumption of harm for bad faith breaches.

Consumer Protection Act. The Supreme Court in Salois v. Mutual of Omaha Ins. Co., 90 Wn.2d 355, 581 P.2d 1349 (1978), held that an insurer's violation of the duty of good faith under RCW 48.01.030 is a *per se* violation of the CPA. This rule was modified by the court in Hangman Ridge Training Stables, Inc. v. Safeco Title Ins. Co., 105 Wn.2d 778, 786, 719 P.2d 531 (1986), however, which held that the only *per se* unfair and deceptive acts or practices are those that are legislatively declared: "A per se unfair trade practice exists when a statute which has been declared by the Legislature to constitute an unfair or deceptive act in trade or commence has been violated."

Because RCW 48.01.030 does not specifically declare that the failure to act in good faith is an unfair trade practice, as required by *Hangman Ridge*, its violation probably does not meet the *Hangman Ridge* test for a *per se* violation of the CPA. *Hangman Ridge* implies that it is a factual issue whether particular non-statutorily condemned acts of bad faith are also unfair or deceptive acts or practices under the CPA. See Donaldson, When Is Bad Faith Claims Handling an Unfair Trade Practice?, 28 Gonz.L.Rev. 11, 16 (1992); see also St. Paul Marine Ins. Co. v. Onvia, Inc., 165 Wn.2d 122, 133–35, 196 P.3d 664 (2008) (applying the *Hangman Ridge* analysis to a bad faith action, without any indication that bad faith actions are *per se* CPA violations).

Two Court of Appeals opinions, however, have broadly held that an insurer's breach of its duty of good faith under RCW 48.01.030 does constitute a *per se* violation of the CPA. Gingrich v. Unigard Sec. Ins. Co., 57 Wn.App. 424, 788 P.2d 1096 (1990) (citing *Salois*); Ledcor Indus. v. Mutual of Enumclaw Ins. Co., 150 Wn.App. 1, 206 P.3d 1255 (2009) (citing *Gingrich*).

In *Hangman Ridge*, the court set forth five elements that a private litigant must prove to recover damages under RCW 19.86.090:

1. An unfair or deceptive act or practice;

2. That occurs in trade or commerce;

3. That impacts the public interest;

4. That causes injury to the plaintiff's business or property; and

5. Which injury is causally linked to the unfair or deceptive act.

Using the *Hangman Ridge per se* analysis, elements 2 and 3 above are established as a matter of law in any insurance bad faith action. Salois v. Mutual of Omaha Ins. Co., 90 Wn.2d 355, 581 P.2d 1349 (1978) (element 2); Hangman Ridge Training Stables, Inc. v. Safeco Title Ins. Co., 105 Wn.2d at 791 (citing RCW 48.01.030) (element 3). The jury should be so instructed when a violation of the CPA is alleged in addition to the cause of action of insurance bad faith. Single violations of WAC 284-30-330 ("Specific unfair claims settlement practices defined") are *per se* unfair or deceptive acts or practices. Truck Ins. Exch. v. Vanport Homes, Inc., 147 Wn.2d 751, 58 P.3d 276 (2002); Leingang v. Pierce Co. Med. Bureau, 131 Wn.2d 133, 151, 930 P.2d 288 (1997); Industrial Indem. Co. v. Kallevig, 114 Wn.2d 907, 923, 792 P.2d 520 (1990).

Contractual obligations. The insurer's duty to handle insurance claims in good faith is in addition to the insurer's contractual obligations under the insurance contract. The difference can be particularly important in terms of the remedy. Contractual estoppel cannot create coverage beyond the provisions of the insurance contract, but an insurer who acts in bad faith may incur liability beyond the contractual limits of the policy. Compare Greer v. Northwestern Nat'l Ins. Co., 109 Wn.2d 191, 743 P.2d 1244 (1987), with Safeco Ins. Co. v. Butler, 118 Wn.2d 383, 823 P.2d 499 (1992).

Comparative bad faith. An issue has been raised by commentators regarding whether comparative bad faith should be used to reduce damages awarded in an insurance bad faith case. See DeWolf & Allen, 16A Washington Practice, Tort Law and Practice § 28:17 (4th ed.). No case has yet considered the question.

Scope of chapter. The instructions in this chapter are limited to the duty of good faith owed by insurers. While the duty of good faith applies also to insureds, see Tornetta v. Allstate Ins. Co, 94 Wn.App. 803, 973 P.2d 8 (1999), and RCW 48.01.030, instructions on this topic are not frequently needed and have not been included in this chapter.

The chapter also does not include a pattern instruction on damages. Damages instructions in this area of the law tend to be case-specific. For discussions of damages, see Harris, Washington Insurance Law, § 7.05 and Chapter 20 (3d ed.), and DeWolf & Allen, 16A Washington Practice, Tort Law and Practice §§ 28:2, 28:3, 28:7, 28:12, 28:12.50, 28:16.50 (4th ed.).

[Current as of September 2018.]

WPI 320.01

INSURER'S FAILURE TO ACT IN GOOD FAITH—BURDEN OF PROOF—GENERAL

(Name of plaintiff) has the burden of proving each of the following propositions:

(1) That (name of insurer) failed to act in good faith in one of the ways claimed by (name of plaintiff);

(2) That (name of plaintiff) was [injured] [damaged]; and

(3) That (name of insurer's) failure to act in good faith was a proximate cause of (name of plaintiff's) [injury] [damage].

If you find from your consideration of all of the evidence that each of these propositions has been proved, your verdict [on the claim of failure to act in good faith] should be for (name of plaintiff). On the other hand, if any of these propositions has not been proved, your verdict [on the claim of failure to act in good faith] should be for (name of insurer).

NOTE ON USE

This instruction should be used for most cases involving first-party claims and certain third-party claims that do not involve the duty to defend, settle, or indemnify. For those third-party claims that do involve the duty to defend, settle, or indemnify, use 320.01.01 (Insurer's Failure to Act in Good Faith—Burden of Proof—General—Third-Party Claims).

Use the bracketed language in the final paragraph if the bad faith claim is combined with other claims.

COMMENT

Background. This instruction is patterned after WPI 21.02 (Burden of Proof on the Issues—No Affirmative Defense) because these claims have been treated by the case law as if they were torts. See Besel v. Viking Ins. Co., 146 Wn.2d 730, 49 P.3d 887 (2002); Safeco Ins. Co. v. Butler, 118 Wn.2d 383, 823 P.2d 499 (1992). For a case discussing

the duty of good faith in a context in which the insurer has not violated the duty to defend, settle, or indemnify, see St. Paul Fire & Marine Ins. Co., v. Onvia, Inc., 165 Wn.2d 122, 196 P.3d 664 (2008).

Terminology—Bad faith versus lack of good faith. Prior to 2004, the first element in this instruction required the plaintiff to prove the insurer "acted in bad faith" rather than "failed to act in good faith." This terminology was consistent with much of the analysis found in the case law and in the treatises, which tends to discuss the issues in terms of an insurer's liability for bad faith rather than liability for failing to act in good faith. See, e.g., Tank v. State Farm, 105 Wn.2d 381, 385, 715 P.2d 1133 (1986); Harris, Washington Insurance Law, Chapter 7 (3d ed.); DeWolf & Allen, 16A Washington Practice, Tort Law & Practice, Chapter 28 (4th ed.).

The "bad faith" terminology, however, does not precisely state the plaintiff's actual burden of proof. The underlying duty for the insurer is to act in good faith. See RCW 48.01.030; WAC 284-30-300 et seq.; DeWolf & Allen, 16A Washington Practice at § 28:1. Consequently, the plaintiff's burden of proof is to show that the insurer failed to meet this duty, i.e., that the insurer failed to act in good faith.

Although judicial opinions often simplify this burden by using the term "acted in bad faith" rather than "failed to act in good faith," the two requirements are not identical. Some acts can occupy a middle ground between good faith and bad faith. Appellate opinions discussing an insurer's bad faith implicitly recognize as much when they note that "[t]he duty to act in good faith or liability for acting in bad faith generally refers to the same obligation." Van Noy v. State Farm Mut. Ins. Co., 142 Wn.2d 784, 793 n.2, 16 P.3d 574 (2001) (quoting *Tank's* language); Tank v. State Farm, 105 Wn.2d at 385. In sum, the term "bad faith" is more a short-hand description of the duty than a precise statement of it.

Because of the importance of accurately stating the burden of proof to the jurors, this pattern instruction, and the other instructions in this chapter, do not use the term "bad faith." The term still appears in Comments within this chapter due to its short-hand ease of use.

[Current as of September 2018.]

WPI 320.01.01

INSURER'S FAILURE TO ACT IN GOOD FAITH—BURDEN OF PROOF—GENERAL—THIRD-PARTY CLAIMS

(Name of plaintiff) **has the burden of proving that** (name of insurer) **failed to act in good faith in one of the ways claimed by** (name of plaintiff).

If you find that (name of insurer) **failed to act in good faith in one of the ways claimed by the plaintiff, then the law presumes that** (name of plaintiff) **was [injured] [harmed] [damaged] [prejudiced] and that the failure to act in good faith was a proximate cause of this [injury] [harm] [damage] [prejudice]. You are bound by that presumption unless you find that** (name of plaintiff) **was not [injured] [harmed] [damaged] [prejudiced] or that** (name of insurer) **was not a proximate cause of** (name of plaintiff's) **[injury] [harm] [damage] [prejudice].** (Name of insurer) **bears the burden of proof that any failure to act in good faith did not [injure] [harm] [damage] [prejudice]** (name of plaintiff).

(Name of plaintiff) **bears the burden of proving the amount of damages.**

NOTE ON USE

This instruction should be used for most cases involving third-party claims of insurance bad faith associated with the underlying settlement or defense of an insured. Use WPI 320.01 (Insurer's Failure to Act in Good Faith—Burden of Proof—General) for third-party claims that do not involve a duty to defend, settle, or indemnify, and for first-party claims.

Use the bracketed language as appropriate. The instruction will need to be modified if the court has ruled as a matter of law that the insurer failed to act in good faith.

COMMENT

The second sentence of the second paragraph of this instruction has

been revised for this edition so that the sentence is grammatically correct. No substantive change is intended.

Background. This instruction is patterned after WPI 21.02 (Burden of Proof on the Issues—No Affirmative Defense) and WPI 24.03 (Presumptions—Rebuttable Mandatory). Third-party claims have been treated by the case law as if they are torts. Any bad faith claim will carry a rebuttable presumption of harm and thus shift the burden of proof on causation once the insured shows the insurer acted in bad faith. See Mutual of Enumclaw Ins. Co v. Dan Paulson Constr., Inc.,161 Wn.2d 903, 169 P.3d 1 (2007); Besel v. Viking Ins. Co., 146 Wn.2d 730, 49 P.3d 887 (2002); Safeco Ins. Co. v. Butler, 118 Wn.2d 383, 823 P.2d 499 (1992).

Terminology—Bad faith versus lack of good faith. See the Comment to WPI 320.01 (Insurer's Failure to Act in Good Faith—Burden of Proof—General).

[Current as of September 2018.]

WPI 320.02

INSURER'S DUTY OF GOOD FAITH—GENERAL DUTY

An insurer has a duty to act in good faith. This duty requires an insurer to deal fairly with its insured. [The insurer must give equal consideration to its insured's interests and its own interests, and must not engage in any action that demonstrates a greater concern for its own financial interests than its insured's financial risk.] An insurer who does not deal fairly with its insured [, or who does not give equal consideration to its insured's interests,] fails to act in good faith.

In proving that an insurer failed to act in good faith, an insured must prove that the insurer's conduct was [unreasonable] [,] [or] [frivolous] [,] [or] [unfounded]. The insured is not required to prove that the insurer acted dishonestly or that the insurer intended to act in bad faith.

NOTE ON USE

Use the bracketed language in the first paragraph for cases in which the duty of equal consideration applies. The instruction may be incorporated with one of the more specific pattern instructions that are designed to apply to particular duties of the insurer.

COMMENT

RCW 48.01.030 sets forth the duty of good faith, providing:

> The business of insurance is one affected by the public interest, requiring that all persons be actuated by good faith, abstain from deception and practice honesty and equity in all insurance matters. Upon the insurer, the insured, their providers, and their representatives rests the duty of preserving inviolate the integrity of insurance.

RCW 48.01.030 is relied on by almost every appellate court that has decided issues involving insurance bad faith. It is the legislative cornerstone of insurance bad faith actions in this state. Instructions based on the statute were approved in Safeco Ins. Co. v. JMG Rests., 37 Wn.App. 1, 680 P.2d 409 (1984). See Tank v. State Farm Fire & Cas. Co., 105 Wn.2d 381, 715 P.2d 1133 (1986).

Prior to 2004, the instruction directly quoted this statutory language. The instruction was rewritten in 2004 in order to use clearer language, to more completely state the insurer's duty, and to focus the jurors on the issues in the particular case at hand. In an appropriate case, however, the court may wish to quote the statutory language.

Equal consideration. The test for equal consideration was set out in *Tank* and continues to be followed. See Mutual of Enumclaw Ins. Co. v. Dan Paulson Constr., Inc., 161 Wn.2d 903, 169 P.3d 1 (2007). At first, the duty of equal consideration was discussed in cases involving an enhanced duty of good faith, such as reservation of rights cases. Recent case law, however, has applied the duty more broadly. See, e.g., St. Paul Fire & Marine Ins. Co., v. Onvia, Inc., 165 Wn.2d 122, 129, 196 P.3d 664 (2008) (type of case: bad faith claim handling under a liability insurance policy); Am. States Ins. Co. v. Symes of Silverdale, Inc., 150 Wn.2d 462, 470, 78 P.3d 1266 (2003) (type of case: bad faith denial of coverage under a property insurance policy); Sharbono v. Universal Underwriters Ins. Co., 139 Wn.App. 383, 411, 161 P.3d 406 (2007) (type of case: liability insurer's bad faith refusal to produce underwriting file); see also Harris, Washington Insurance Law, § 2.02 (3d ed.); DeWolf & Allen, 16A Washington Practice, Tort Law & Practice § 28:9 (4th ed.).

General duty of good faith. To prove bad faith, the policyholder must show that the insurer's conduct was "unreasonable, frivolous, or unfounded." Am. Best Food, Inc. v. Alea London, Ltd., 168 Wn.2d 398, 412–13, 229 P.3d 693 (2010) (specially noting the disjunctive nature of this standard); Smith v. Safeco Ins. Co. 150 Wn.2d 478, 78 P.3d 1274 (2003); Am. States Ins. Co. v. Symes of Silverdale, Inc., 150 Wn.2d at 469; Barstad v. Stewart Title Guar. Co, 145 Wn.2d 528, 543, 39 P.3d 984 (2002); Griffin v. Allstate Ins. Co., 108 Wn.App. 133, 143–44, 29 P.3d 777 (2001).

An insured need not prove that the insurer's bad faith was intentional or fraudulent. See Coventry Assoc. v. Am. States Ins. Co., 136 Wn.2d 269, 961 P.2d 933 (1998); Sharbono v. Universal Underwriters Ins. Co., 139 Wn.App. at 410–11 ("An insurer may breach its broad duty to act in good faith by conduct short of intentional bad faith or fraud, although not by a good faith mistake."); Int'l Ultimate, Inc. v. St. Paul Fire & Marine Ins. Co., 122 Wn.App. 736, 756, 87 P.3d 774 (2004).

[Current as of September 2018.]

WPI 320.03

INSURER'S FAILURE TO ACT IN GOOD FAITH IN DEFENDING SUBJECT TO A RESERVATION OF RIGHTS

An insurer who, under a reservation of rights, defends a claim owes a duty of good faith to its insured. This duty requires the insurer to:

[thoroughly investigate the liability and damage issues related to the claim;]

[retain competent defense counsel, recognize that the defense counsel represents only the insured and not the insurer, and act accordingly;]

[fully inform the insured that the insurer is defending the case subject to a reservation of rights;]

[fully inform the insured of all developments relevant to the policy coverage and the progress of the claim against the insured;] [and]

[refrain from conduct that demonstrates a greater concern for the insurer's financial interest than for the insured's financial risk].

An insurer who fails to fulfill [this duty] [any of these duties] fails to act in good faith.

NOTE ON USE

Use this instruction when an insured claims that an insurer did not properly defend a claim handled under a reservation of rights.

An instruction on all of the listed duties may not be needed in every case. Use the bracketed phrases as appropriate. The court may choose to define the term "reservation of rights" if the term has not been adequately explained during the course of the trial.

COMMENT

This instruction was originally adapted from DeWolf & Allen, 16A Washington Practice, Tort Law and Practice § 28:9 (4th ed.), and is based on Tank v. State Farm Fire & Cas. Co., 105 Wn.2d 381, 715 P.2d 1133 (1986). See *Tank* for further discussion regarding duties owed to the insured by counsel hired by the insurance company.

The court in Safeco Ins. Co. v. Butler, 118 Wn.2d 383, 823 P.2d 499 (1992), discussed at length the enhanced duties owed by an insurer to an insured under a reservation of rights. Once an insured proves bad faith conduct, a rebuttable presumption is created that the insured was prejudiced thereby, i.e., that harm was proximately caused by the insurer's bad faith conduct. See also Besel v. Viking Ins. Co., 146 Wn.2d 730, 737, 49 P.3d 887 (2002).

Furthermore, the *Butler* court stated that if the insured establishes bad faith handling of the claims, the insurer is estopped from denying coverage, even if a valid contractual exception to coverage would otherwise exist. This remedy is necessary for the cause of action of insurance bad faith because, otherwise, the remedy would be the same for insurance bad faith as it is for a simple violation of the insurance contract (which would limit recovery to matters covered by the insurance contract). Compare Safeco Ins. Co. v. Butler, 118 Wn.2d 383, with cases applying estoppel under contract analysis: Greer v. Nw. Nat'l Ins. Co., 109 Wn.2d 191, 743 P.2d 1244 (1987); Shows v. Pemberton, 73 Wn.App. 107, 868 P.2d 164 (1994).

Although the courts discuss an "enhanced" duty of good faith on the part of insurers, it is the WPI Committee's view that the term is unnecessary in a jury instruction, in which no comparative or baseline standard is offered or discussed.

The enhanced duty of good faith in a reservation of rights case requires an insurer to give equal consideration to its insured's interests and its own interests. See Tank v. State Farm Fire & Cas. Co., 105 Wn.2d 381, 385–86, 715 P.2d 1133 (1986); Safeco Ins. Co. v. Butler, 118 Wn.2d at 389; Van Noy v. State Farm Mut. Ins. Co., 142 Wn.2d 784, 793, 797, 16 P.3d 574 (2001); Harris, Washington Insurance Law § 2.02 (3rd ed.).

This enhanced duty of good faith has been held not to apply to underinsured motorist (UIM) cases and to certain first-party cases. See Ellwein v. Hartford Acc. & Indem. Co., 142 Wn.2d 766, 778–81, 15 P.3d 640 (2001) (UIM case), overruled on other grounds in Smith v. Safeco Ins. Co., 150 Wn.2d 478, 78 P.3d 1274 (2003); see also Barstad v. Stewart Title Guar. Co., 145 Wn.2d 528, 542–43, 39 P.3d 984 (2002) (first-party case involving preliminary title commitments); Fortson-

Kemmerer v. Allstate Ins. Co., 198 Wn.App. 387, 394–95, 398 P.3d 849 (2017), petition for review denied 189 Wn.2d 1039 (2018); but see Am. States Ins. Co. v. Symes of Silverdale, Inc., 150 Wn.2d 462, 78 P.3d 1266 (2003) (denial of coverage case, in which the court applied the "equal consideration" test even though the case did not involve an enhanced duty of good faith).

[Current as of September 2018.]

WPI 320.04

INSURER'S FAILURE TO ACT IN GOOD FAITH—DENIAL OF FIRST-PARTY CLAIMS

The duty of good faith requires an insurer to conduct a reasonable investigation before refusing to pay a claim submitted by its insured. An insurer must also have a reasonable justification before refusing to pay a claim.

An insurer who refuses to pay a claim, without conducting a reasonable investigation or without having a reasonable justification, fails to act in good faith.

NOTE ON USE

Use this instruction when an insurance company is being sued by an insured for a bad faith refusal to pay a claim.

The instruction should be incorporated at the end of WPI 320.02 (Insurer's Duty of Good Faith—General Duty), which more generally describes the insurer's duty. If not incorporated into WPI 320.02 (Insurer's Duty of Good Faith—General Duty), the instruction above should begin with a statement that the insurer has a duty to act in good faith when dealing with its insured.

COMMENT

This instruction is based on the language in Industrial Indem. Co. v. Kallevig, 114 Wn.2d 907, 792 P.2d 520 (1990).

The court in *Kallevig* specifically limited its holding to first-party claims, i.e., claims by named insureds against their insurers for coverage. The instruction in *Kallevig* stated that "an insurer must make a *good faith* investigation . . . ." Industrial Indem. Co. v. Kallevig, 114 Wn.2d at 917 (emphasis added). The pattern instruction uses "reasonable" instead of "good faith" to avoid circular reasoning.

Single violations of the claims handling responsibilities of insurers pursuant to RCW 48.30.010 and WAC 284-30-330 constitute *per se* unfair trade practices by virtue of RCW 19.86.170. Industrial Indem. Co. Kallevig, 114 Wn.2d at 925. See also the discussion in WPI 320.00 (Introduction).

Cases involving bad faith denial of coverage claims include: Am.

States Ins. Co. v. Symes of Silverdale, Inc., 150 Wn.2d 462, 78 P.3d 1266 (2003) (denial of coverage due to suspected arson by insured); Ellwein v. Hartford Acc. & Ins. Co., 142 Wn.2d 766, 15 P.3d 640 (2001) (automobile insurer litigated in bad faith by misappropriating insured's expert witness and making low settlement offers), overruled on other grounds in Smith v. Safeco Ins. Co., 150 Wn.2d 478, 78 P.3d 1274 (2003); see also Coventry Assocs. v. Am. States Ins. Co., 136 Wn.2d 269, 961 P.2d 933 (1998) (property insurer may be liable for bad faith investigation into coverage issues even if coverage was properly denied); Industrial Indem. Co. v. Kallevig, 114 Wn.2d 907, 792 P.2d 520 (1990) (denial of fire insurance coverage because insurer suspected insured set fire); and Fortson-Kemmerer v. Allstate Ins. Co., 198 Wn.App. 387, 394–95, 398 P.3d 849 (2017), petition for review denied 189 Wn.2d 1039 (2018).

[Current as of September 2018.]

WPI 320.05

INSURER'S FAILURE TO ACT IN GOOD FAITH—FAILURE TO INVESTIGATE AND EXPLORE SETTLEMENT

The duty of good faith requires an insurer to:

[(1) Perform a reasonable investigation and evaluation of a claim against its insured;]

[(2) Affirmatively make a good faith effort to settle the claim, if its investigation discloses a reasonable likelihood that its insured may be liable. This includes an obligation to conduct good faith settlement negotiations sufficient to ascertain the most favorable terms available and make an informed evaluation of the settlement demand;]

[(3) Evaluate settlement offers as though it bore the entire risk, including the risk of any judgment in excess of the policy limits;]

[(4) Timely communicate its investigations and evaluations, and any settlement offers, to its insured;] [and]

[(5) If the settlement demand exceeds the insurer's policy limits, communicate the offer to its insured, ascertain whether the insured is willing to make the necessary contribution to the settlement amount, and exercise good faith in deciding whether to pay its own limits.]

An insurer who fails to fulfill [this duty] [any of these duties] fails to act in good faith.

NOTE ON USE

Use this instruction when an insured claims the insurer failed to use good faith efforts to explore settlement or settle within policy limits in a case in which the insured was exposed to an excess verdict.

COMMENT

This instruction is based on the principles set forth in Truck Insurance Exchange v. Century Indem. Co., 76 Wn.App. 527, 887 P.2d 455 (1995), which summarized Washington law regarding bad faith failure to settle. See also Smith v. Safeco Ins. Co., 112 Wn.App. 645, 650–51, 50 P.3d 277 (2002) (slightly restating the *Truck Insurance Exchange* principles and adding factors to use with regard to breaches of duty), reversed on other grounds, 150 Wn.2d 478, 78 P.3d 1274 (2003). The WPI Committee has restated these principles in order to more concisely and clearly state the applicable law for jurors. Also, the instruction has been rephrased in terms of "reasonableness," rather than "diligence," for consistency with other instructions in tort cases. See WPI Chapter 10 (Negligence); see also WAC 284-30-330(4) (referring to "reasonable" investigations).

The duty to investigate and explore settlement arises out of the duties to defend and pay indemnity. St. Paul Fire & Marine Ins. Co., v. Onvia, Inc., 165 Wn.2d 122, 129, 196 P.3d 664 (2008). These are continuing duties. See Moratti v. Farmers Ins. Co., 162 Wn.App. 495, 254 P.3d 939 (2011) (the appellate court also approved an instruction based on WPI 320.05). In *Truck Insurance Exchange*, Division I of the Court of Appeals held that a primary insurer could be held liable for a bad faith failure to settle a case on appeal. While an excess carrier has no direct cause of action for bad faith against the primary carrier, it is equitably subrogated to the rights of the insured.

Several other cases have addressed the duty to investigate and explore settlement. Hamilton v. State Farm Ins. Co., 83 Wn.2d 787, 523 P.2d 193 (1974) (bad faith failure to settle within $10,000 limits when verdict was $45,000; the "no limit" jury instruction was approved, and the court held that a flat refusal to negotiate under circumstances involving substantial exposure to liability and limited insurance can constitute bad faith); Burnham v. Commercial Cas. Ins. Co., 10 Wn.2d 624, 117 P.2d 644 (1941) (not bad faith to fail to settle within $5,000 policy limits when the verdict was for $21,400; the court stated that insurer was not liable "in the absence of negligence or bad faith"); Tyler v. Grange Ins. Ass'n, 3 Wn.App. 167, 473 P.2d 193 (1970) (bad faith failure to settle auto claim within $10,000 policy limit when the verdict was $29,087.40; the court held that the "no limit" standard should be adopted, and recognized the hybrid—negligence and bad faith—nature of an insurance bad faith cause of action).

The remedy for a bad faith failure to investigate and explore settlement is coverage by estoppel, a presumption of harm, and insurer liability for any excess verdict plus interest. Besel v. Viking Ins. Co., 146 Wn.2d 730, 736–37, 49 P.3d 887 (2002); Safeco Ins. Co. v. Butler, 118 Wn.2d 383, 393, 823 P.2d 499 (1992); Greer v. Nw. Nat'l Ins. Co., 109 Wn.2d 191, 203 n.6, 743 P.2d 1244 (1987) (citing 40 A.L.R.2d 168 (1955)).

[Current as of September 2018.]

WPI 320.06

VIOLATIONS OF INSURANCE REGULATIONS RELATED TO SETTLEMENT OF CLAIMS

A violation, if any, of one or more of the following requirements is [a breach of the duty of good faith] [an unfair method of competition] [an unfair or deceptive act or practice in the business of insurance] [and] [a breach of the insurance contract]:

[Misrepresenting pertinent facts or insurance policy provisions.]

[Failing to acknowledge and act reasonably promptly upon communications with respect to claims arising under insurance policies.]

[Failing to adopt and implement reasonable standards for the prompt investigation of claims arising under insurance policies.]

[Refusing to pay claims without conducting a reasonable investigation.]

[Failing to affirm or deny coverage of claims within a reasonable time after fully completed proof of loss documentation has been submitted.]

[Not attempting in good faith to effectuate prompt, fair, and equitable settlements of claims in which liability has become reasonably clear.] [In particular, this includes an obligation to promptly pay property damage claims to innocent third parties in clear liability situations. If two or more insurers share liability, they should arrange to make appropriate payment, leaving to themselves the burden of apportioning liability.]

[[Unreasonably] compelling an insured to initiate or

submit to litigation, arbitration, or appraisal to recover amounts due under an insurance policy by offering substantially less than the amounts ultimately recovered in such actions or proceedings.]

[Attempting to settle a claim for less than the amount to which a reasonable person would have believed he or she was entitled by reference to written or printed advertising material accompanying or made part of an application.]

[Making a claim payment to an insured or beneficiary not accompanied by a statement setting forth the coverage under which the payment is being made.]

[Asserting to an insured that it is the insurer's policy to appeal from arbitration awards in favor of insureds for the purpose of compelling them to accept settlements or compromises less than the amount awarded in arbitrations.]

[Delaying the investigation or payment of claims by requiring an insured or his or her physician to submit a preliminary claim report and then requiring subsequent submissions which contain substantially the same information.]

[Failing to promptly settle claims, where liability has become reasonably clear, under one portion of the insurance policy coverage in order to influence settlements under other portions of the insurance policy coverage.]

[Failing to promptly provide a reasonable explanation of the basis in the insurance policy in relation to the facts or applicable law for denial of a claim or for the offer of a compromise settlement.]

[Unfairly discriminating against claimants because they are represented by a public adjuster.]

[Failing to expeditiously honor drafts given in settlement of claims. A failure to honor a draft within three working days after notice of receipt by the payor bank will constitute a violation of this provision. Dishonor of a draft for valid reasons related to the settlement of the claim will not constitute a violation of this provision.]

[Failing to adopt and implement reasonable standards for the processing and payment of claims after the obligation to pay has been established. Except as to those instances where the time for payment is governed by statute or rule or is set forth in an applicable contract, procedures that are not designed to deliver a check or draft to the payee in payment of a settled claim within fifteen business days after receipt by the insurer or its attorney of properly executed releases or other settlement documents are not acceptable. Where the insurer is obligated to furnish an appropriate release or settlement document to an insured or claimant, it must do so within twenty working days after a settlement has been reached.]

[Delaying appraisals or adding to their cost under insurance policy appraisal provisions through the use of appraisers from outside the loss area. The use of appraisers from outside the loss area is appropriate only where the unique nature of the loss or a lack of competent local appraisers make the use of out-of-area appraisers necessary.]

[Failing to make a good faith effort to settle a claim before exercising a contract right to an appraisal.]

[Negotiating or settling a claim directly with any claimant known to be represented by an attorney without the attorney's knowledge and consent. This does not prohibit routine inquiries to an insured claimant to identify the claimant or to obtain details concerning the claim.]

NOTE ON USE

Use the brackets as appropriate depending on the causes of action alleged and facts of the case. This instruction should be given with WPI 310.03 (*Per Se* Violation of Consumer Protection Act) in consumer protection actions, and with WPI 60.03 (Violation of Statute, Ordinance, Administrative Rule, or Internal Governmental Policy—Evidence of Negligence) in negligence actions.

COMMENT

RCW 48.30.010(1) prohibits any person engaged in insurance from using unfair or deceptive acts or practices in the conduct of such business. RCW 48.30.010(2) authorizes the Insurance Commissioner to promulgate regulations that define certain minimal standards. The duties outlined are taken from WAC 284-30-330, which was amended in 2011 to clarify existing language.

Additional duties may be drawn from appropriate statutes or other insurance claims handling regulations found in WAC 284-30-300 through 284-30-750, which define minimal standards that become part of every insurance contract. St. Paul Fire & Marine Ins. Co., v. Onvia, Inc., 165 Wn.2d 122, 196 P.3d 664 (2008).

Single violations of WAC 284-30-330, et seq., are unfair and deceptive acts or practices as a matter of law, and are *per se* violations of the Consumer Protection Act (CPA). RCW 19.86.020 to.080. Truck Ins. Exch. v. Vanport Homes, Inc., 147 Wn.2d 751, 58 P.3d 276 (2002); Leingang v. Pierce Co. Med. Bureau, 131 Wn.2d 133, 151, 930 P.2d 288 (1997); Industrial Indem. Co. v. Kallevig, 114 Wn.2d 907, 923, 792 P.2d 520 (1990). RCW 48.30.010(2). Some are also unfair methods of competition. See the discussion of *per se* violations of the Consumer Protection Act in WPI 320.00 (Insurance Bad Faith—Introduction); see also WPI 310.00 (Consumer Protection Act—Introduction) and WPI 310.03 (*Per Se* Violation of the Consumer Protection Act) and its Comment.

The instruction uses the language of WAC 284-30-330 verbatim except that the language based upon WAC 284-30-330(7) ("[c]ompelling an insured to initiate or submit to litigation, arbitration, or appraisal . . . by offering considerably less than the amounts ultimately recovered . . .") was modified for this edition by adding the word "unreasonably" in brackets to accord with case law holding that a reasonableness standard applies even though not explicit in the language of the regulation. See Perez-Crisantos v. State Farm Fire and Cas. Co., 187 Wn.2d 669, 389 P.3d 476 (2017); Am. Mfrs. Mut. Ins. Co. v. Osborn, 104 Wn.App. 686, 699–700, 17 P.3d 1229 (2001) (citing cases). Use the bracketed word "unreasonably" as applicable.

In 2013, the WPI Committee expanded the instruction so that it ap-

plies not only to CPA claims, but also to negligence claims and bad faith claims. The instruction was also revised to reflect changes to the underlying language from WAC 284-30-330.

[Current as of September 2018.]

WPI 320.06.01

INSURANCE FAIR CONDUCT ACT

(Name of plaintiff) claims that (name of insurer) has violated the Washington Insurance Fair Conduct Act. To prove this claim, (name of plaintiff) has the burden of proving each of the following propositions:

(1) That (name of insurer) [unreasonably denied a claim for coverage] [unreasonably denied payment of benefits];

(2) That (name of plaintiff) was [injured] [damaged]; and

(3) That (name of insurer's) act or practice was a proximate cause of (name of plaintiff's) [injury] [damage].

If you find from your consideration of all of the evidence that each of these propositions has been proved, your verdict [on this claim] should be for (name of plaintiff). On the other hand, if any of these propositions has not been proved, your verdict [on this claim] should be for (name of insurer).

NOTE ON USE

The instruction applies to cases filed under the Insurance Fair Conduct Act (IFCA). The first element includes a bracketed clause that can be used when *per se* violations of the act are claimed.

COMMENT

RCW 48.30.010(7); RCW 48.30.015.

Element (1) of this instruction was revised for this edition. The instruction no longer includes a cause of action under IFCA based on an insurer violating "a statute or regulation governing the business of insurance claims handling." Perez-Crisantos v. State Farm Fire and Cas. Co., 187 Wn.2d 669, 682, 389 P.3d 476 (2017).

Recovery under IFCA is limited to first-party claimants. RCW 48.30.010(7). A first-party claimant is defined as an individual or entity

"asserting a right of payment as a covered person under an insurance policy or insurance contract arising out of the occurrence of the contingency or loss covered by such a policy or contract." RCW 48.30.015(4). If the plaintiff's status as a first-party claimant is in dispute, then a jury instruction can be crafted based on this statutory definition.

Claims under IFCA are similar to, but not identical with, related bad faith or Consumer Protection Act (CPA) claims. The elements differ slightly (compare this instruction with WPI 320.01) and an IFCA claimant may recover triple damages and reasonable attorney fees without having to prove a violation of the CPA. See RCW 48.30.015.

[Current as of September 2018.]

WPI 320.07

SPECIAL VERDICT FORM—INSURER'S FAILURE TO ACT IN GOOD FAITH

(Insert caption.)

We, the jury, answer the questions submitted by the court as follows:

QUESTION 1: Did (name of insurer) **fail to act in good faith?**

ANSWER: _____ (Write "yes" or "no")

(INSTRUCTION: If you answered "no" to Question 1, sign this verdict form. If you answered "yes" to Question 1, answer Question 2.)

QUESTION 2: Did (name of insurer's) **failure to act in good faith proximately cause [injury] [damage] to** (name of plaintiff)**?**

ANSWER: _____ (Write "yes" or "no")

(INSTRUCTION: If you answered "no" to Question 2, sign this verdict form. If you answered "yes" to Question 2, answer Question 3.)

QUESTION 3: What is the amount of (name of plaintiff's) **damages?**

ANSWER: $_____

(DIRECTION: Sign this verdict and notify the bailiff.)

DATE: _____ _____

Presiding Juror

NOTE ON USE

Select the appropriate bracketed term in question number 2.

See the Comment below as to modifying this verdict form and as to damages issues.

COMMENT

This verdict form will need to be modified in some insurance bad faith cases. For example, in some cases the amount of damages will not be in dispute, inasmuch as the recovery will be determined by the amount of the underlying judgment or settlement.

This chapter does not include a pattern instruction on damages. The WPI Committee found it impractical to draft a pattern instruction because the recoverable elements of damages in insurance bad faith cases vary greatly depending on the underlying facts and claims. See generally Harris, Washington Insurance Law, § 7.05 and Chapter 20 (3d ed.), and 16A DeWolf & Allen, Washington Practice, Tort Law and Practice, §§ 28:2, 28:3; 28:7, 28:12, 28:12.50, 28:16.50 (4th ed.). Practitioners should draft a damages instruction by adapting the format of other pattern damages instructions to fit the facts and claims of the particular insurance bad faith case. See, e.g., WPI 30.01.01 (Measure of Economic and Noneconomic Damages—Personal Injury—No Contributory Negligence).

[Current as of September 2018.]

PART XVI

EMPLOYMENT

CHAPTER 330 EMPLOYMENT DISCRIMINATION

CHAPTER 330

EMPLOYMENT DISCRIMINATION

WPI 330.00	Employment discrimination—Introduction
WPI 330.01	Employment Discrimination—Disparate Treatment—Burden of Proof
WPI 330.01.01	Employment Discrimination—Disparate Treatment—Burden of Proof—Substantial Factor
WPI 330.01.02	Employment Discrimination—Disparate Treatment—Adverse Employment Action—Definition
WPI 330.02	Employment Discrimination—Disparate Impact—Business Necessity—Definition
WPI 330.03	Employment Discrimination—Disparate Impact—Business Necessity—Burden of Proof
WPI 330.04	Employment Discrimination—Bona Fide Occupational Qualification (BFOQ) Defense
WPI 330.05	Employment Discrimination—Retaliation
WPI 330.06	Retaliation—Adverse Employment Action—Definition
WPI 330.21	Workplace Harassment—General
WPI 330.22	Sexual Harassment—Quid Pro Quo—Burden of Proof
WPI 330.23	Workplace Harassment—Hostile Work Environment—Burden of Proof
WPI 330.24	Harassment—Hostile Work Environment—"Manager" and "Management"—Definitions
WPI 330.31	Disability Discrimination—Definition of Disability—Disparate Treatment Cases
WPI 330.31.01	Disability Discrimination—Definition of Impairment
WPI 330.32	Disability Discrimination—Treatment—Burden of Proof
WPI 330.33	Disability Discrimination—Reasonable Accommodation—Burden of Proof
WPI 330.34	Disability Discrimination—Reasonable Accommodation—Definition

WPI 330.35	Disability Discrimination—Reasonable Accommodation—Employer Notice and Employee's Duty to Cooperate
WPI 330.36	Disability Discrimination—Undue Hardship
WPI 330.37	Essential Function—Definition
WPI 330.40	Discrimination Based on Religion or Creed—Failure to Accommodate—Definition
WPI 330.41	Discrimination Based on Religion or Creed—Reasonable Accommodation—Burden of Proof
WPI 330.42	Discrimination Based on Religion or Creed—Failure to Accommodate—Defense and Undue Hardship
WPI 330.50	Wrongful Termination in Violation of Public Policy
WPI 330.51	Wrongful Termination in Violation of Public Policy—Burden of Proof
WPI 330.52	Wrongful Termination in Violation of Public Policy—Constructive Discharge—Burden of Proof
WPI 330.81	Damages—Economic and Non-Economic—No After-Acquired Evidence
WPI 330.81.01	Damages—Economic and Non-Economic—After-Acquired Evidence
WPI 330.81.02	Damages—After-Acquired Evidence
WPI 330.82	Damages—Employment Discrimination—Future Lost Earnings (Front Pay)
WPI 330.83	Damages—Mitigation—Wage Loss
WPI 330.90	Employee Versus Independent Contractor (Minimum Wage Act)
WPI 330.91	Joint Employer Status (Minimum Wage Act)

WPI 330.00

EMPLOYMENT DISCRIMINATION—INTRODUCTION

Statutory discrimination claims. State law discrimination claims usually arise under RCW Chapter 49.60, which prohibits discrimination on the basis of creed, color, disability, marital status, national origin, race, religion, gender, HIV infection, use of a trained guide or service dog, and military status, as well as retaliation for opposing discriminatory practices. Other state statutes supplement RCW Chapter 49.60. See, e.g., RCW 49.44.090 (implying right of action for age discrimination) and RCW 49.58.020 (expressing right of action for gender discrimination in pay for "comparable work"; but see Marquis v. City of Spokane, 130 Wn.2d 97, 112–15, 922 P.2d 43 (1996) (allowing independent contractor to bring a discrimination claim under the Washington Law Against Discrimination (WLAD)).

State law wage and hour claims may arise under RCW Chapter 49.46, the Minimum Wage Act. RCW Chapter 49.46 definitions and standards are now included in these pattern instructions, including instructions on joint employers and employee/independent contractor classifications. WPI 330.90 (Employee Versus Independent Contractor (Minimum Wage Act)); WPI 330.91 (Joint Employer Status (Minimum Wage Act)). These instructions may not apply to claims arising under other statutes or common law.

These instructions relate only to causes of action arising under RCW Chapter 49.60, RCW Chapter 49.44, RCW Chapter 49.46, and common law wrongful termination or constructive discharge in violation of public policy. Any causes of action based on city or county ordinances are not addressed by these instructions.

Because RCW 49.60.040(11) defines "employer" to include "any person acting in the interest of an employer, directly or indirectly," a phrase that "encompass[es] individual supervisors and managers," individual supervisors and managers "along with their employers, may be held liable [under RCW Chapter 49.60] for their discriminatory acts." Brown v. Scott Paper Worldwide Co., 143 Wn.2d 349, 357–59, 361, 20 P.3d 921 (2001). While these instructions are phrased to cover claims against employers, they can be adapted to cover claims against multiple defendants, labor unions (see RCW 49.60.190), employment agencies (see RCW 49.60.200), and anyone who "aid[s], abet[s], encourage[s], or incite[s]" discrimination (see RCW 49.60.220). An "aiding and abetting" instruction is not provided in these pattern instructions, as aiding and abetting cases have not arisen with sufficient frequency to generate significant appellate court discussion of the subject.

Interaction with federal law. Washington cases recognize federal authority as a helpful guide in construing RCW Chapter 49.60, but only when it "best further[s] the purposes and mandates of our state statute." Blackburn v. State, 186 Wn.2d 250, 258, 375 P.3d 1076 (2016). However, federal law interpretations are inapplicable when the language of the state statute differs significantly from that in the corresponding federal statute. Brown v. Scott Paper Worldwide Co., 143 Wn.2d at 358, and Martini v. Boeing Co., 137 Wn.2d 357, 372–77, 971 P.2d 45 (1999) (federal law not helpful when the statutory language differs significantly).

RCW Chapter 49.60's liberal construction mandate makes it broader in scope than Title VII. Martini v. Boeing Co., 137 Wn.2d at 372–73 (citing RCW 49.60.020). When the Washington Supreme Court interpretationsof the WLAD differ from those of federal statutes, "it has almost always ruled that the WLAD provides greater employee protections than its federal counterparts do." Kumar v. Gate Gourmet Inc., 180 Wn.2d 481, 491, 325 P.3d 193, 197–98 (2014); see, e.g., Brownfield v. City of Yakima, 178 Wn.App. 850, 872, 316 P.3d 520, 532 (2014) (while

ADA requires "but for" causation, WLAD disability claims usea less stringent "substantial factor" test

Also, federal law discrimination claimsmay bejoined with claims brought under RCW Chapter 49.60 because some federal discrimination claims may be brought in state court. See, e.g., Yellow Freight System, Inc., v. Donnelly, 494 U.S. 820, 821, 110 S.Ct. 1566, 108 L.Ed.2d 834 (1990) (holding that state courts have concurrent authority to adjudicate Title VII claims); DeHorney v. Bank of America Nat. Trust and Sav. Ass'n, 879 F.2d 459, 463 (9th Cir. 1989) (holding that state courts have concurrent authority to adjudicate section 1981 claims); Hiatt v. Walker Chevrolet Co., 120 Wn.2d 57, 64, 837 P.2d 618 (1992) (Title VII); Sambasivan v. Kadlec Med. Ctr., 184 Wn.App. 567, 570, 578, 338 P.3d 860 (2014) (§ 1981 and WLAD claims); and Miguel v. Guess, 112 Wn.App. 536, 541,51 P.3d 89 (2002) (§ 1983 claim against public employer).

Major sources of federal anti-discrimination law include:

- Title VII of the Civil Rights Act of 1964, 42 U.S.C.A. §§ 2000e et seq., which prohibits discrimination on the basis of race, color, religion, gender, pregnancy, and national origin, see WPI Part XVII, Civil Rights, including WPI 340.00 (Civil Rights—Introduction);

- the Americans with Disabilities Act, 29 U.S.C.A. §§ 12101 et seq., and the Rehabilitation Act, 29 U.S.C.A. §§ 791 et seq., which prohibit discrimination on the basis of disability;

- the Age Discrimination in Employment Act, 29 U.S.C. §§ 621 et seq., which prohibits discrimination on the basis of age;

- the Equal Pay Act, 29 U.S.C.A. § 206(d)(1), which prohibits discrimination in pay on the basis of sex; and

- 42 U.S.C.A. § 1981, which prohibits discrimination on the basis of race, ancestry, ethnicity (see St. Francis College v. Al-Khazraji, 481 U.S. 604, 614, 107 S.Ct. 2022, 2028, 95 L.Ed.2d 582 (1987)), and in some instances religion (see Shaare Tefila Congregation v. Cobb, 481 U.S. 615, 617–18,107 S.Ct. 2019, 95 L.Ed.2d 594 (1987)).

These statutes also prohibit retaliation.

A number of federal circuits, including the Ninth Circuit, have model jury instructions on certain employment discrimination claims arising under federal statutes. When federal issues exist, or when state law is silent on an issue that has been addressed in federal statutes or cases, these model instructions may provide some assistance.

Disparate treatment claims. Disparate treatment instructions

are set forth in WPI 330.01 (Discrimination—Disparate Treatment—Burden of Proof) and WPI 330.32 (Disability Discrimination—Treatment—Burden of Proof). Disparate treatment, which "is the most easily understood type of discrimination," occurs when "[t]he employer simply treats some people less favorably than others because of their race, color, religion, sex, . . . national origin" or other prohibited characteristic. Blackburn v. State, 186 Wn.2d 250, 258, 375 P.3d 1076 (2016). "When an employee makes out a claim of disparate treatment under the WLAD, like Title VII, the employer's action is unlawful unless the employer has a valid justification . . ." such as affirmative action or a bona fide occupational qualification. Blackburn v. State, 186 Wn.2d at 258–59.

In 2014, the Washington Supreme Court recognized a claim for failure to make a religious accommodation. Kumar v. Gate Gourmet, Inc., 180 Wn.2d 481, 325 P.3d 193 (2014). In E.E.O.C. v. Abercrombie & Fitch Stores, Inc., ___ U.S. ___, 135 S.Ct. 2028, 2033–34, 192 L.Ed.2d 35 (2015), the U.S. Supreme Court held that a disparate treatment claim based on religion arises under Title VII when the employer makes the employee's religious practice an issue in an employment decision.

Bona fide occupational qualification defense. Sometimes, an employer may justify an otherwise discriminatory decision by asserting a bona fide occupational qualification ("BFOQ") defense. RCW 49.60.180(1); Hegwine v. Longview Fibre Co., 162 Wn.2d 340, 357–58, 172 P.3d 688, 698 (2007). WPI 330.04 (Employment Discrimination—Bona Fide Occupational Qualification (BFOQ) Defense), applies to the BFOQ defense in refusal to hire or wrongful discharge situations. Kries v. WA-SPOK Primary Care, LLC, 190 Wn.App. 98, 128, 362 P.2d 974 (2015).

Disparate impact claims. Disparate impact analysis bars "facially neutral employment policies that have disproportionate adverse effects on a protected class." Kumar v. Gate Gourmet Inc., 180 Wn.2d 481, 499, 325 P.3d 193, 202 (2014). "To establish a prima facie case of disparate impact, the plaintiff must show that (1) a facially neutral employment practice (2) falls more harshly on a protected class." Kumar v. Gate Gourmet Inc., 180 Wn.2d at 503. See WPI 330.02 (Employment Discrimination—Disparate Impact—Business Necessity—Definition).

Workplace harassment claims. Sexual harassment cases generally fall into two types of claims: "the quid pro quo sexual harassment claim, where the employer requires sexual consideration from the employee for job benefits, and the hostile work environment claim." Antonius v. King County, 153 Wn.2d 256, 261, 103 P.3d 729, 732 (2004). RCW Chapter 49.60 also allows hostile work environment claims based on other protected characteristics. Robel v. Roundup Corp., 148 Wn.2d 35, 48, 59 P.3d 611, 615 (2002) (allowing disability-based hostile work environment claim); Davis v. W. One Auto. Grp., 140 Wn.App. 449, 457,

166 P.3d 807, 811 (2007) (race-based hostile work environment claim); Fisher v. Tacoma Sch. Dist. No. 10, 53 Wn.App. 591, 595–96, 769 P.2d 318 (1989) (allowing race-based hostile work environment claim).

The two basic types of workplace protected category harassment claims are covered in WPI 330.21 (Workplace Harassment—General), together with WPI 330.22 (Sexual Harassment—Quid Pro Quo—Burden of Proof), or WPI 330.23 (Workplace Harassment—Hostile Work Environment—Burden of Proof). See Glasgow v. Georgia-Pacific Corp., 103 Wn.2d 401, 405, 693 P.2d 708 (1985). These instructions can be adapted for use in retaliation cases, when the retaliation takes the form of work place harassment, or for use in harassment based on other prohibited characteristics, such as race. See the Comment to WPI 330.23 (Workplace Harassment—Hostile Work Environment—Burden of Proof).

Disability claims.A disabled employee may have a cause of action for at least two different types of discrimination: (1) disparate treatment because of the employee's disability, and (2) failure to accommodate when the employer failed to reasonably accommodate the employee's disability. Riehl v. Foodmaker, Inc., 152 Wn.2d 138, 144–45, 94 P.3d 930 (2004) (citing RCW 49.60.180).

The Legislature substantially amended RCW Chapter 49.60 in 2007 by defining "disability," a term previously undefined in the statute. See RCW 49.60.040(7). This amendment expanded the definition in response to the decision in McClarty v. Totem Elec., 157 Wn.2d 214, 137 P.3d 844 (2006), in which the Supreme Court determined that the definition of "disability" found in the Americans with Disabilities Act, 42 U.S.C. § 12101, applied in actions brought under RCW Chapter 49.60. See Hale v. Wellpinit Sch. Dist. No. 49, 165 Wn.2d 494, 502, 198 P.3d 1021, 1025 (2009). The instructions at WPI 330.31 (Disability Discrimination—Definition of Disability—Disparate Treatment Cases), WPI 330.31.01 (Disability Discrimination—Definition of Impairment) and WPI 330.33 (Disability Discrimination—Reasonable Accommodation—Burden of Proof) incorporate the legislative definition, which is considerably broader than the definition previously adopted in *McClarty* and the federal law definition. The current legislative definition applies to all causes of action occurring before July 6, 2006, and on or after July 21, 2007. Hale v. Wellpinit Sch. Dist. No. 49, 165 Wn.2d at 502; RCW 49.60.040.

Claims of failure to reasonably accommodate a disability are covered by WPI 330.33 (Disability Discrimination—Reasonable Accommodation—Burden of Proof) and WPI 330.34 (Disability Discrimination—Reasonable Accommodation—Definition). Such claims arise from the recognition that "*different* treatment may eliminate discrimination against the [disabled] and open the door to employment opportunities." Holland v. Boeing Co., 90 Wn.2d 384, 388, 583 P.2d 621 (1978) (emphasis in original). An employer must "reasonably accommodate a

disabled employee unless the accommodation would be an undue hardship on the employer." Riehl v. Foodmaker, 152 Wn.2d 138, 145, 94 P.3d 930 (2004). An employer's duty to accommodate does not require it to alter the "essential functions" of the job, properly understood as the "fundamental job duties" or "indispensable" tasks of the position. Davis v. Microsoft Corp., 149 Wn.2d 521, 534–35, 70 P.3d 126 (2003).

Retaliation. It is unlawful for an employer to retaliate against a person for (1) opposing what the person reasonably believed to be discrimination in violation of RCW Chapter 49.60 or (2) providing information to or participating in a proceeding to determine whether discrimination or retaliation occurred. See WPI 330.05 (Employment Discrimination—Retaliation). One of the elements of a retaliation claim is an adverse employment action. The definition of an adverse employment action is different for retaliation claims than for claims of disparate treatment. Compare WPI 330.04 (Employment Discrimination—Bona Fide Occupational Qualification (BFOQ) Defense) with WPI 330.01.02 (Employment Discrimination—Disparate Treatment—Adverse Employment Action—Definition).

Employee versus independent contractor classification. Depending on the cause of action, a plaintiff's ability to bring a successful claim may turn on whether the law classifies the plaintiff as an "employee" or an "independent contractor." See Anfinson v. FedEx Ground Package Sys., Inc., 174 Wn.2d 851, 871, 281 P.3d 289 (2012) (discussing definition of "employee" for Minimum Wage Act claim); Sambasivan v. Kadlec Med. Ctr., 184 Wn.App. 567, 590–92, 338 P.3d 860, 872 (2014) (allowing independent contractor to bringWLAD retaliation claim); Ebling v. Gove's Cove, Inc., 34 Wn.App. 495, 497–98, 663 P.2d 132 (1983) (discussing definition of "employee" for Wage Rebate Act claim). For Minimum Wage Act claims when there is a question about the plaintiff's employee or independent contractor status, WPI 330.90 (Employee Versus Independent Contractor (Minimum Wage Act)) should be used.

Damages. The most common elements of compensatory damages in cases brought under RCW Chapter 49.60, including damages for future lost wages, are covered in WPI 330.81 (Damages—Economic and Non-Economic—No After-Acquired Evidence) and WPI 330.82 (Damages—Employment Discrimination—Future Lost Earnings (Front Pay)). A third instruction, WPI 330.83 (Damages—Mitigation—Wage Loss), addresses the issue of failure to mitigate in an employment discrimination case when the failure is related to efforts to pursue other employment opportunities.

The instructions now incorporate the after-acquired evidence doctrine, which can reduce a plaintiff's lost wage damages when the employer discovers misconduct by the employee. WPI 330.81.01 (Damages—Economic and Non-Economic—After-Acquired Evidence); WPI

330.81.02 (Damages—After-Acquired Evidence). An employer can reduce back pay damages and preclude front pay damages by demonstrating it would have terminated the employee if it had known of the employee's misconduct at the time. Lodis v. Corbis Holdings, Inc., 192 Wn.App. 30, 60, 366 P.3d 1246, (2015), review denied 185 Wn.2d 1038 (2016).

Common law claims. Increasingly, employment law claims are going to trial based on common law theories. See, e.g., Robel v. Roundup Corp., 148 Wn.2d 35, 51, 59 P.3d 611 (2002) (outrage claim arising out of work place harassment); Roberts v. Dudley, 140 Wn.2d 58, 71, 993P.2d 901 (2000) (wrongful discharge in violation of public policy); Bennett v. Hardy, 113 Wn.2d 912, 919, 784 P.2d 1258 (1990) (discharge in violation of public policy); but see Haubry v. Snow, 106 Wn.App. 666, 678, 31 P.3d 1186 (2001) (no negligent infliction of emotional distress claim based on same facts as discrimination claim).

In 2015, the Washington Supreme Court revived the wrongful termination in violation of public policy tort by overruling the requirement that a plaintiff establish inadequacy of alternative remedies. Rose v. Anderson Hay & Grain Co., 184 Wn.2d 268, 286, 358 P.3d 1139, 1145 (2015); Becker v. Cmty. Health Sys., Inc., 184 Wn.2d 252, 258, 359 P.3d 746 (2015); Rickman v. Premera Blue Cross, 184 Wn.2d 300, 309–10, 358 P.3d 1153 (2015). The court reaffirmed the approach it had established in Thompson v. St. Regis Paper Co., 102 Wn.2d 219, 685 P.2d 1081 (1984) and Gardner v. Loomis Armored Inc., 128 Wn.2d 931, 913 P.2d 377 (1996).

The *Rose* court stated that a plaintiff will satisfy his or her burden and establish liability under one of the four common scenarios: (1) when employees are fired for refusing to commit an illegal act, (2) when employees are fired for performing a public duty or obligation, such as serving jury duty, (3) when employees are fired for exercising a legal right or privilege, such as filing workers' compensation claims, and (4) when employees are fired in retaliation for reporting employer misconduct, i.e., whistleblowing. Rose v. Anderson Hay & Grain Co., 184 Wn.2d 268, 286–87, 358 P.3d 1139 (2015).

The *Rose* court also noted that while the *Thompson* analysis will suffice in most cases, a more "refined analysis" might be necessary when the facts do not fit neatly into one of the four scenarios. In those cases, a court will analyze a claim for wrongful discharge in violation of public policy under a *Gardner* analysis, by examining:

> (1) the existence of a "clear public policy" (clarity element), (2) whether "discouraging the conduct in which [the employee] engaged would jeopardize the public policy" (jeopardy element), (3) whether the "public-policy-linked conduct caused the dismissal" (causation

element), and (4) whether the employer is "able to offer an overriding justification for the dismissal" (absence of justification element).

Rose v. Anderson Hay & Grain Co., 184 Wn.2d at 277, quoting Gardner v. Loomis Armored Inc., 128 Wn.2d 931, 941, 913 P.2d 377 (1996).

Wrongful termination and constructive discharge in violation of public policy are now covered in WPI 330.50 (Wrongful Termination in Violation of Public Policy), WPI 330.51 (Wrongful Termination by Employer in Violation of Public Policy—Burden of Proof), and WPI 330.52 (Wrongful Termination in Violation of Public Policy—Constructive Discharge—Burden of Proof).

[Current as of September 2018.]

WPI 330.01

EMPLOYMENT DISCRIMINATION—DISPARATE TREATMENT—BURDEN OF PROOF

Discrimination in employment on the basis of [age] [creed] [disability] [marital status] [national origin] [race] [religion] [gender] [sexual orientation] [honorably discharged veteran status] [military status] is prohibited.

To establish [his] [her] "disparate treatment claim," (name of plaintiff) **has the burden of proving each of the following propositions:**

(1) That (name of defendant) **took an adverse employment action against** (name of plaintiff)**; and**

(2) That (name of plaintiff's) **[age] [creed] [disability] [marital status] [national origin] [race] [religion] [gender] [sexual orientation] [honorably discharged veteran status] [military status] was a substantial factor in** (name of defendant's) **decision to take the adverse action.**

If you find from your consideration of all the evidence that both of these propositions have been proved, your verdict should be for (name of plaintiff) **[on this claim]. On the other hand, if either of the propositions has not been proved, your verdict should be for** (name of defendant) **[on this claim].**

NOTE ON USE

Use WPI 330.01.02 (Employment Discrimination—Disparate Treatment—Adverse Employment Action—Definition) if there is a factual issue whether the employer's action is an adverse employment action.

Select the bracketed words or phrases as appropriate.

This instruction is intended for use in a disparate treatment case involving a discrete adverse employment action, such as a discharge, demotion, a change in benefits or compensation, a layoff, or a failure to

hire or promote. The parties will usually set out their competing views on the employer's motivation in a summary of claims instruction. This instruction simply describes the ultimate issue to be decided by the jury.

For a disparate impact claim, rather than a disparate treatment claim, use WPI 330.03 (Employment Discrimination—Disparate Impact—Business Necessity—Burden of Proof) with WPI 330.02 (Employment Discrimination—Disparate Impact—Business Necessity—Definition) instead of this instruction.

For workplace harassment cases, use this instruction with WPI 330.21 (Workplace Harassment—General) and, depending on the theory of the case, WPI 330.22 (Sexual Harassment—Quid Pro Quo—Burden of Proof) or WPI 330.23 (Workplace Harassment—Hostile Work Environment—Burden of Proof).

When necessary to avoid confusion, "sex" may be substituted for "gender" in gender discrimination cases. Washington's law against discrimination specifically provides that "sex" and "gender" are interchangeable. RCW 49.60.040(25).

For a discussion of honorably discharged veteran status and military status, see the Comment.

For disability discrimination cases, do not use this instruction. Instead, use WPI 330.32 (Disability Discrimination—Treatment—Burden of Proof), et seq.

In a retaliation case, use WPI 330.05 (Discrimination—Retaliation).

This instruction should be used with WPI 21.01 (Meaning of Burden of Proof—Preponderance of the Evidence).

Agency may be an issue in cases challenging discrete employment decisions. WPI 50.18 (Corporation Acts Through its Employees—No Issue as to Scope of Agency) may be used in such cases. When a plaintiff has made a claim against a supervisor or manager who personally participated in the challenged employment decisions(s) and/or act(s), this instruction may need to be modified. See the discussion in the Comment.

COMMENT

Washington's law against discrimination provides that it is an "unfair practice" to:

discharge or bar any person from employment because of age, sex,

marital status, sexual orientation, race, creed, color, national origin, honorably discharged veteran or military status, or the presence of any sensory, mental, or physical disability or the use of a trained-dog guide or service animal by a person with a disability.

RCW 49.60.180(2). With the exception of age bias, which is separately prohibited for people 40 years or older, discrimination against these protected groups is also prohibited by RCW 49.60.030, a statutory declaration of civil rights. Age bias is addressed at RCW 49.44.090.

In Washington, discrimination on the basis of pregnancy is a form of gender discrimination and, therefore, unlawful. See, e.g., WAC 162-30-020; 162-12-140(3)(n); Hegwine v. Longview Fibre Co., 162 Wn.2d 340, 172 P.3d 688 (2007); Kuest v. Regent Assisted Living, Inc., 111 Wn.App. 36, 43 P.3d 23 (2002).

The term "sexual orientation" is defined in RCW 49.60.040(26). The statutory definition includes ". . . heterosexuality, homosexuality, bisexuality, and gender expression or identity." The term "disability" is defined and codified in RCW 49.60.040, as amended in 2007.

The term "honorably discharged veteran or military status" is defined in RCW 49.60.040(15) as referring to a person who is:

(a) A veteran, as defined in RCW 41.04.007; or

(b) An active or reserve member in any branch of the armed forces of the United States, including the national guard, coast guard, and armed forces reserves.

Under RCW 41.04.007, a veteran is a person who has received an honorable discharge, or received a discharge for medical reasons with an honorable record, or is in receipt of a United States department of defense discharge document DD form 214, NGB form 22, or their equivalent or successor discharge paperwork, that characterizes his or her service as honorable, after having served in certain designated capacities. In a particular case, some of this statutory terminology may need to be incorporated into the jury instructions.

The plaintiff must ultimately prove that the prohibited factor was a "substantial factor" in an employer's adverse employment action. Scrivener v. Clark College, 181 Wn.2d 439, 444, 334 P.3d 541 (2014), citing Mackay v. Acorn Custom Cabinetry, Inc., 127 Wn.2d 302, 310, 898 P.2d 284 (1995) (the "substantial factor" test, rather than a "determining factor" test, is the appropriate standard for determining whether an employer's adverse employment decision was "because of" one of the prohibited factors enumerated in RCW 49.60.180(2)).

In some cases, it may be appropriate to instruct the jury on a "cat's

paw," or subordinate bias, theory regarding proximate cause. Boyd v. State, 187 Wn.App.1, 19–20, 349 P.3d 864 (2015) (approving the instruction, "if a supervisor performs an act motivated by retaliatory animus that is intended by the supervisor to cause an adverse employment action, and if that act is relied on by the employer and is a substantial factor in the ultimate employment action, then the employer is liable for retaliation").

Motion practice often deals with shifting productions of evidence and whether a party has met the requisites of a prima facie case. See, e.g., McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802–804, 93 S.Ct. 1817, 36 L.Ed. 2d 668 (1973) and Hill v. BCTI Income Fund-I, 144 Wn.2d 172, 180–81, 23 P.3d 440 (2001). The jury should not be instructed on burden shifting. See, e.g., Kastanis v. Educ. Employees Credit Union, 122 Wn.2d 483, 490, 859 P.2d 26, 865 P.2d 507 (1993), as amended, 122 Wash. 2d 483, 865 P.2d 507 (1994) (shifting burden rules were never intended as a charge to the jury); and Burnside v. Simpson Paper Co., 66 Wn.App. 510, 523, 832 P.2d 537 (1992) (burden of proof formulation was not intended as a prospective jury charge), affirmed 123 Wn.2d 93, 864 P.2d 937 (1994).

For much the same reason, an instruction or language on pretext is inappropriate. Kastanis v. Educ. Employees Credit Union, 122 Wn.2d 483, 495, 859 P.2d 26 (1993), as amended 865 P.2d 507 (1994) ("a separate instruction on pretext is unnecessary"). However, Farah v. Hertz Transporting, Inc., 196 Wn.App. 171, 181, 383 P.3d 552, 558 (2016), review denied 187 Wn.2d 1023 (2017), held that while a pretext instruction "might be appropriate" in cases addressing permissible inferences of discrimination, such an instruction is not required.

Damages are not always an element of the claim, so they are not included as such in this instruction. Under Davis v. Department of Labor and Industries, 94 Wn.2d 119, 615 P.2d 1279 (1980), for example, one might be entitled to a favorable ruling on liability even absent a showing of damages. Beyond this, "[i]f no actual damage is shown [in an RCW Chapter 49.60 case], nominal damages will be presumed." Lewis v. Doll, 53 Wn.App. 203, 212, 765 P.2d 1341 (1989); see also Browning v. Slenderella System of Seattle, 54 Wn.2d 440, 341 P.2d 859 (1959) (RCW 9.91.010 case).

As indicated in the Note on Use, the pattern instruction was drafted to apply to cases involving an employer's discrete decision to discharge, lay off, not hire, not to promote an employee, or other tangible adverse action. See RCW 49.60.180(2). In addition to these decisions, the statute separately prohibits employers from "discriminat[ing] against any person in compensation or in other terms or conditions of employment" on the basis of the same protected categories. RCW 49.60.180(3). For cases falling under these latter prohibitions, the instruction may need to be modified.

In some cases, jurors may need to be instructed about principles of agency. In Brown v. Scott Paper Worldwide Co., 143 Wn.2d 349, 20 P.3d 921 (2001), the court held that individual supervisors, as well as their employers, may be held liable for discriminatory acts.

[Current as of September 2018.]

WPI 330.01.01

EMPLOYMENT DISCRIMINATION—DISPARATE TREATMENT—BURDEN OF PROOF—SUBSTANTIAL FACTOR

"Substantial factor" means a significant motivating factor in bringing about the employer's decision. "Substantial factor" does not mean the only factor or the main factor in the challenged act or decision. ["Substantial factor" also does not mean that (name of plaintiff) **would have been [promoted] [hired] [not terminated] [not laid off] but for [his] [her] [age] [creed] [disability] [marital status] [national origin] [race] [religion] [gender] [sexual orientation] [honorably discharged veteran status] [military status].]**

NOTE ON USE

Use this instruction with WPI 330.01 (Employment Discrimination—Disparate Treatment—Burden of Proof), to define the term "substantial factor."

The bracketed final sentence distinguishes the "substantial factor" analysis of causation from the traditional "but for" analysis. The sentence should be used only in cases that have some claims that are subject to the "substantial factor" analysis and other claims that are subject to the "but for" analysis.

COMMENT

The language defining "substantial factor" was approved by the Supreme Court in Scrivener v. Clark College, 181 Wn.2d 439, 444, 334 P.3d 541, citing Mackay v. Acorn Custom Cabinetry, Inc., 127 Wn.2d 302, 310, 898 P.2d 284 (1995). See also Currier v. Northland Services, Inc., 182 Wn.App. 733, 746–47, 332 P.3d 1006 (2014).

[Current as of September 2018.]

WPI 330.01.02

EMPLOYMENT DISCRIMINATION—DISPARATE TREATMENT—ADVERSE EMPLOYMENT ACTION—DEFINITION

An adverse employment action is one that materially affects the terms, conditions or privileges of employment.

NOTE ON USE

Use with WPI 330.01 (Employment Discrimination—Disparate Treatment—Burden of Proof) when there is an issue of fact whether the employer's action was significant enough to constitute an adverse employment action.

If both disparate treatment and retaliation are involved, combine the instruction with WPI 330.06 (Retaliation—Adverse Employment Action—Definition) to differentiate adverse employment action in disparate treatment claims from adverse employment action in retaliation claims.

COMMENT

This instruction was first published inthe 2017–2018 Supplement to 6A Washington Practice, Washington Pattern Jury Instructions: Civil (6th ed.). It is based on the federal Ninth Circuit model jury instruction (9th Cir. Civ. Jury Instr. 10.4A.2 (2007)).

An adverse employment action has long been understood to include a firing or demotion, and a failure to hire or promote. Davis v. Dep't of Labor & Indus., 94 Wn.2d 119, 615 P.2d 1279 (1980). There will generally be no dispute in such cases. A hostile work environment may amount to an adverse employment action. Robel v. Roundup Corp., 148 Wn.2d 35, 59 P.3d 611 (2002) (verbal and non-verbal harassment based on disability); Harrell v. Dep't of Soc. & Health Servs., 170 Wn.App. 386, 398, 285 P.3d 159 (2012). A broad array of other actions may either singularly or taken together constitute an adverse action, including reassignment with significantly different responsibilities, or a decision causing a significant change in benefits. Boyd v. State, 187 Wn.App.1, 11–12, 349 P.3d 864 (2015); Marin v. King County, 194 Wn.App. 795, 808, 378 P.3d 203, review denied 186 Wn.2d 1028 (2016).

An action must involve a change in employment that is more than an inconvenience or alteration of one's job responsibilities. Boyd v. State, 187 Wn.App. at 11–12; Kirby v. City of Tacoma, 124 Wn.App. 454, 98 P.3d 827 (2004). However, the distinction between an adverse

employment action and a mere "inconvenience" or "alterations of one's job responsibilities" is not a bright line. See Alonso v. Qwest Commc'ns Co., LLC, 178 Wn.App. 734, 747, 315 P.3d 610 (2013) (whether loss of certain van and cellular phone benefits constituted adverse employment action an issue of fact for the jury); Davis v. W. One Auto Grp., 140 Wn.App. 449, 166 P.3d 807 (2007) (failure to give plaintiff same recognition as employee of the month, such as posting his picture or letting him drive the car of his choice, was sufficient to state a claim).

Illustrating the fact-specific nature of the inquiry is Blackburn v. Dep't of Soc. & Health Servs., 186 Wn.2d 250, 375 P.3d 1076 (2016), which involved a decision not to schedule African-American staff on a single weekend because of a Western State Hospital resident's violent racist conduct. Reversing the trial court, the Washington Supreme Court held that a staffing decision for a single weekend could constitute disparate treatment "in the terms and conditions of employment." However, the Supreme Court affirmed the holding that the single weekend decision was not severe and pervasive enough to constitute a hostile environment, therefore affirming the dismissal of that claim.

[Current as of September 2018.]

WPI 330.02

EMPLOYMENT DISCRIMINATION—DISPARATE IMPACT—BUSINESS NECESSITY—DEFINITION

It is unlawful for an employer to [engage in a practice] [apply a preference] [impose a requirement] [use an overall selection process] [(other adverse action)] that has a disparate impact on [individuals of a particular race] [women] [men] [individuals who are 40 years old or older] [individuals of a particular creed] [individuals with a particular disability] [individuals of a particular religion] [individuals of a particular national origin] [individuals with a particular marital status] [individuals with a particular sexual orientation] [honorably discharged veterans] [individuals with a particular military status], unless it is adequately justified.

A [practice] [preference] [requirement] [overall selection process] [(other adverse action)] has a "disparate impact" if it is apparently neutral in its treatment of individuals regardless of [race] [gender] [age] [creed] [disability] [religion] [national origin] [marital status] [sexual orientation] [honorably discharged veteran status] [military status], but in fact falls more harshly on [one racial group than on others] [women than on men] [men than on women] [individuals 40 or older than on individuals under 40] [individuals of a particular creed than on others] [individuals with a particular disability than on others] [members of one religion than on others] [individuals of a particular national origin than on others] [individuals with a particular marital status than on others] [individuals of a particular sexual orientation] [honorably discharged veterans] [individuals with a particular military status].

NOTE ON USE

In a disparate impact case, use this instruction with WPI 330.03 (Employment Discrimination—Disparate Impact—Business Necessity—Burden of Proof). For a disparate treatment case, use WPI 330.01 (Employment Discrimination—Disparate Treatment—Burden of Proof), instead of these instructions.

This instruction is designed for use in a variety of discrimination/disparate impact situations; use the bracketed phrases as appropriate. If the questioned activity of the employer does not fall within one of the phrases used in the instruction, briefly describe the activity or action in place of "other adverse action." If additional protected groups are added by changes in state law the instruction should be adapted accordingly.

For a discussion of honorably discharged veteran status and military status, see the Comment to WPI 330.01 (Employment Discrimination—Disparate Treatment—Burden of Proof).

COMMENT

This instruction is drawn largely from Shannon v. Pay 'N Save, 104 Wn.2d 722, 709 P.2d 799 (1985). The Washington Supreme Court acknowledged the continuing viability of a disparate impact analysis in Kumar v. Gate Gourmet Inc., 180 Wn.2d 481, 503, 325 P.3d 193 (2014). Previously, in Hegwine v. Longview Fibre Co., 162 Wn.2d 340, 354, 172 P.3d 688 (2007), the Supreme Court held that an employer bears the burden of production, rather than the burden of proof, regarding the business necessity defense to a disparate impact claim. See further discussion below.

In *Shannon*, the court explained that "[u]nlike disparate treatment, the disparate impact theory enables a plaintiff to address the consequences of seemingly objective employment practices by allowing the plaintiff to prevail in an employment discrimination suit without establishing discriminatory motive." Shannon v. Pay 'N Save, 104 Wn.2d at 727. It "requires a plaintiff to prove: (1) a facially neutral employment practice, (2) falls more harshly on a protected class." Shannon v. Pay 'N Save, 104 Wn.2d at 727.The term "neutral" in this context "refers to an employment practice that contains no reference to race or other protected classes." Oliver v. Pacific Northwest Bell Telephone Co., Inc., 106 Wn.2d 675, 679 n.1, 724 P.2d 1003 (1986).

The court in *Shannon* also held, citing federal authority interpreting Title VII of the Civil Rights Act of 1964, that a disparate impact theory is only to be applied to "an employment practice that includes objective treatment," i.e., that does not "turn on discretionary decisions . . . ." Shannon v. Pay 'N Save, 104 Wn.2d 722, 733, 709 P.2d 799 (1985). See also Oliver v. Pacific Northwest Bell, 106 Wn.2d at 679–80 (relying on *Shannon*). The *Kumar* and *Hegwine* decisions did not specifically discuss this aspect of disparate impact analysis in Washington.

Since *Shannon*, federal law has changed in at least three respects. First, the United States Supreme Court has clearly held that one can challenge subjective practices under the disparate impact approach. Watson v. Fort Worth Bank and Trust, 487 U.S. 977, 108 S.Ct. 2777,

101 L.Ed.2d 827 (1988). Second, Congress has said that the employer must show as part of its rebuttal burden not only that the selection procedure is job related for the job in question, but also that it is consistent with business necessity. 42 U.S.C.A. § 2000e-2(k)(1)(A)(i). Third, Congress has clarified the respective burdens of the employer and the employee, when the employee, as in *Shannon*, uses statistics showing the overall effect of the selection process. 42 U.S.C.A. § 2000e-2(k)(1)(B).

The Washington Law Against Discrimination (WLAD) also includes an implied requirement for employers to reasonably accommodate religious practices, thereby avoiding disparate impacts. Kumar v. Gate Gourmet Inc., 180 Wn.2d 481, 500–01, 325 P.3d 193 (2014).Thus, the Washington Supreme Court has recognized a state law claim for failure to reasonably accommodate religious practices. Kumar v. Gate Gourmet Inc., 180 Wn.2d at 496–501. Use WPI 330.40 (Discrimination Based on Religion or Creed—Failure to Accommodate—Definition) for failure to reasonably accommodate religious practices claims. See also the Comment to WPI 330.03 (Employment Discrimination—Disparate Impact—Business Necessity—Burden of Proof), including employer's defense and plaintiff's rebuttal.

[Current as of September 2018.]

WPI 330.03

EMPLOYMENT DISCRIMINATION—DISPARATE IMPACT—BUSINESS NECESSITY—BURDEN OF PROOF

To recover on [his] [her] claim of discrimination based on disparate impact, (name of plaintiff) has the burden of proving the following proposition:

(1) (Name of defendant) [engaged in a practice] [used an overall selection process] [applied a preference] [imposed a requirement] [(other adverse action)] that has a disparate impact on [individuals of a particular race] [individuals of a particular creed] [women] [men] [individuals 40 or older] [individuals with a particular disability] [individuals of a particular religion] [individuals of a particular national origin] [individuals with a particular marital status] [individuals of a certain sexual orientation] [honorably discharged veterans] [individuals with a particular military status]. [(Name of plaintiff) can meet [his] [her] burden by showing that either an overall selection process or a given [practice] [preference] [requirement] has a disparate impact.]

[On this claim,] (name of plaintiff) does not have to prove that (name of defendant) intended to discriminate on the basis of [age] [creed] [disability] [marital status] [national origin] [race] [religion] [gender] [honorably discharged veteran status] [military status] or treat [individuals of (name of plaintiff's) race] [men] [women] [individuals 40 or older] [individuals with (name of plaintiff's) disability] [individuals of (name of plaintiff's) religion] [individuals of (name of plaintiff's) national origin] [individuals of the same marital status as (name of plaintiff)] [individuals of (name of plaintiff's) sexual orientation] [honorably discharged veterans] [individuals having (name of plaintiff's) military status] more harshly than others.

If (name of plaintiff) **has failed to prove proposition (1), then your verdict should be for** (name of defendant) **[on this claim].**

If (name of plaintiff) **has proved proposition (1), then** (name of defendant) **has the burden of producing evidence that:**

(2) the [practice] [preference] [requirement] [overall selection process] [(other adverse action)**] is an accurate measure of ability to perform fundamental requirements of the job.**

If (name of plaintiff) **has proved proposition (1) and** (name of defendant) **has failed to produce evidence as to proposition (2), then your verdict should be for** (name of plaintiff) **[on this claim].**

If (name of plaintiff) **has proved proposition (1) and** (name of defendant) **has produced evidence as to proposition (2), then** (name of plaintiff) **has the burden of proving that:**

(3) there are other equally suitable alternatives that do not have as harsh an impact on [individuals of (name of plaintiff's) **race] [men] [women] [individuals 40 or older] [individuals with** (name of plaintiff's) **disability] [individuals of** (name of plaintiff's) **religion] [individuals of** (name of plaintiff's) **national origin] [individuals of the same marital status as** (name of plaintiff)**] [individuals of** (name of plaintiff's) **sexual orientation] [honorably discharged veterans] [individuals having** (name of plaintiff's) **military status].**

If (name of plaintiff) **has proved proposition (1) and** (name of defendant) **has produced evidence as to proposition (2), and** (name of plaintiff) **has then failed to prove proposition (3), then your verdict should be for** (name of defendant) **[on this claim]. If** (name of plaintiff) **has proved proposition (3), then your verdict should be for** (name of plaintiff) **[on this claim].**

NOTE ON USE

Use this instruction with WPI 330.02 (Employment Discrimina-

tion—Disparate Impact—Business Necessity—Definition). See the Note on Use for WPI 330.02 (Employment Discrimination—Disparate Impact—Business Necessity—Definition) regarding the bracketed phrases and "other adverse action."

Use the bracketed phrase "on this claim" when multiple claims are before the jury and this pattern instruction does not apply to them all.

Use WPI 330.42 (Discrimination Based on Religion or Creed—Failure to Accommodate—Defense and Undue Hardship) for a failure to reasonably accommodate religious practices claim.

For a discussion of honorably discharged veteran status and military status, see the Comment to WPI 330.01 (Employment Discrimination—Disparate Treatment—Burden of Proof).

COMMENT

See the Comment to WPI 330.02 (Employment Discrimination—Disparate Impact—Business Necessity—Definition).

In some cases, there may be a question of fact as to whether the plaintiff falls within one of the protected categories. This is most likely to occur in a disability case, although there may be factual issues related to other categories as well. In such cases, the burden of proof instruction will have to be modified to indicate that the plaintiff must prove that he or she is within the protected category or class. See, e.g., WPI 330.32 (Disability Discrimination—Treatment—Burden of Proof) and WPI 330.31 (Disability Discrimination—Definition of Disability—Disparate Treatment Cases).

Formerly, once the plaintiff established a prima facie case of discrimination on the basis of a disparate impact theory, "the burden shifts to the defendant to show that the challenged requirement has a 'manifest relationship' to the position in question." Shannon v. Pay 'N Save, 104 Wn.2d 722, 727, 709 P.2d 799 (1985) (citing Griggs v. Duke Power Co., 401 U.S. 424, 91 S.Ct. 849, 28 L.Ed.2d 158 (1971)). "If the employer meets this burden, the plaintiff may still prevail by showing that other less discriminatory alternatives can equally serve the employer's legitimate business requirements." Shannon v. Pay 'N Save, 104 Wn.2d at 727.

"[T]o establish a business necessity defense an employer must prove by professionally accepted measures that the hiring or promotion test utilized accurately predicts or significantly correlates with the fundamental requirements of job performance . . . ." Shannon v. Pay 'N Save, 104 Wn.2d at 731. According to the court, this reaffirms the tenet that "discriminatory preference occurs when an objective measure-

ment unrelated to job performance results in the under-representation of a protected class." Shannon v. Pay 'N Save, 104 Wn.2d at 731.

In Hegwine v. Longview Fibre Co., 162 Wn.2d 340, 356, 172 P.3d 688 (2007), the court held that even though the burden of production shifts to the employer to produce evidence of a business necessity, the burden of persuasion always remains with the employee. The court thus rejected arguments that business necessity is an affirmative defense for the employer. Hegwine v. Longview Fibre Co., 162 Wn.2d at 356. For further discussion, see the Comment to WPI 330.02 (Employment Discrimination—Disparate Impact—Business Necessity—Definition).

In this regard, Washington law differs from federal law, which places the burden of proving business necessity on the employer. See 42 U.S.C. § 2000e-2(k). The federal statute also provides that the plaintiff may make a showing of an alternative non-discriminatory practice, but now must also show that the defendant "refuses to adopt such alternative employment practice." 42 U.S.C. § 2000e-2(k)(1)(A)(ii) and (1)(C).

[Current as of September 2018.]

WPI 330.04

EMPLOYMENT DISCRIMINATION—BONA FIDE OCCUPATIONAL QUALIFICATION (BFOQ) DEFENSE

It is unlawful for an employer to [refuse to hire] [discharge] any person because of such person's [age] [creed] [disability] [marital status] [national origin] [race] [religion] [gender] [sexual orientation] [honorably discharged veteran status] [military status]. It is a defense to (name of plaintiff's) **[refusal-to-hire] [discharge] claim if the requirement of** (describe requirement) **is a bona fide occupational qualification.**

To establish that [his] [her] [its] requirement is a bona fide occupational qualification, (name of defendant) **has the burden of proving both of the following propositions:**

(1) That (name of defendant) **applies the requirement uniformly to all [applicants for] [candidates for] [persons in] the job; [and]**

(2) That all or substantially all individuals who fail to meet the requirement are unable to perform the job safely and efficientlyorthat excluding those individuals was essential to the purposes of the position.

If you find from your consideration of all of the evidence that (name of defendant) **has proved that [his] [her] [its] decision [not to hire] [to discharge]** (name of plaintiff) **was based on a bona fide occupational qualification, then you should find in favor of** (name of defendant) **[on this claim]. If, however, you find from your consideration of all the evidence that** (name of defendant) **has failed to prove either proposition (1) or (2), then your verdict should be in favor of** (name of plaintiff) **[on this claim].**

NOTE ON USE

Use this instruction as written when the defense of bona fide occupational qualification (BFOQ) is raised in a disparate treatment claim of failure-to-hire or discharge. If there are other claims or issues in the case, such as whether or not the plaintiff met non-discriminatory qualifications for the position, it may be necessary to modify this instruction or add other instructions.

Select the appropriate bracketed words or phrases.

COMMENT

This instruction was revised for the 2017–2018 Supplement to 6A Washington Practice, Washington Pattern Jury Instructions: Civil (6th ed.) to incorporate the availability of the BFOQ defense in discharge cases.

This instruction is written to apply to disparate treatment claims of failure-to-hire, failure-to-promote, or failure-to-transfer in light of the specific language of RCW 49.60.180(1). See also RCW 49.60.180(4). The instruction is also written to apply to discharge cases in light of the holding in Kries v. WA-SPOK Primary Care, LLC, 190 Wn.App. 98, 128, 362 P.3d 974 (2015) ("the defense of a bona fide occupational qualification is available to the employer in a discharge case in addition to a refusal to hire case"). It can be modified to apply to other adverse actions that involve the BFOQ defense. In addition to the BFOQ defense, other related special defenses are available in age discrimination cases involving termination of employment. See RCW 49.60.205; RCW 49.44.090.

To establish a valid BFOQ defense, an employer must show that excluding members of the particular protected status group is essential to the purposes of the job or that all or substantially all persons in the class would be unable to efficiently perform the duties of the position and the essence of the operation would be undermined by hiring anyone in the excluded class. Hegwine v. Longview Fibre Co., 162 Wn.2d 340, 357–58, 172 P.3d 688 (2007) (citing WAC 162-16-240) and Franklin County Sheriff's Office v. Sellers, 97 Wn.2d 317, 646 P.2d 113 (1982).

For a discussion of honorably discharged veteran status and military status, see the Comment to WPI 330.01 (Employment Discrimination—Disparate Treatment—Burden of Proof).

[Current as of September 2018.]

WPI 330.05

EMPLOYMENT DISCRIMINATION—RETALIATION

It is unlawful for an employer to retaliate against a person for

[opposing what the person reasonably believed to be discrimination on the basis of [age] [creed] [disability] [religion] [sexual orientation] [honorably discharged veteran status] [military status] [marital status] [national origin] [race] [gender]] [and] [or] [providing information to or participating in a proceeding to determine whether discrimination or retaliation occurred].

To establish a claim of unlawful retaliation by (name of employer), (name of plaintiff) **has the burden of proving both of the following propositions:**

(1) That (name of plaintiff) **[was opposing what [he] [she] reasonably believed to be discrimination on the basis of [age] [creed] [disability] [religion] [marital status] [national origin] [race] [gender] [honorably discharged veteran status] [military status]] [or] [was [providing information to] [participating in] a proceeding to determine whether discrimination or retaliation had occurred]; and**

(2) That a substantial factor in the decision to [discipline] [demote] [deny the promotion] [terminate] was (name of plaintiff's) **[opposing what [he] [she] reasonably believed to be discrimination or retaliation] [or] [[providing information to] [participating in] a proceeding to determine whether discrimination or retaliation had occurred].**

If you find from your consideration of all of the evidence that both of these propositions has been proved, then your verdict should be for (name of plaintiff) **[on this claim].**

On the other hand, if any one of these propositions has not been proved, your verdict should be for (name of defendant) **[on this claim].**

(Name of plaintiff) **does not have to prove that [his] [her] [opposition] [participation in the proceeding] [was] [were] the only factor or the main factor in** (name of defendant's) **decision, nor does** (name of plaintiff) **have to prove that [he] [she] would not have been [disciplined] [demoted] [denied the promotion] [terminated] but for [his] [her] [opposition] [participation].**

NOTE ON USE

Use the bracketed phrases as appropriate. It may be appropriate to substitute other allegedly retaliatory acts in proposition (2).

Use this instruction instead of WPI 330.01 (Employment Discrimination—Disparate Treatment—Burden of Proof) or WPI 330.02 (Employment Discrimination—Disparate Impact—Business Necessity—Definition).

This instruction is not designed for use in a statutory "whistleblower" case pursuant to RCW Chapter 42.40.

For a discussion of honorably discharged veteran status and military status, see the Comment to WPI 330.01 (Employment Discrimination—Disparate Treatment—Burden of Proof).

COMMENT

The elements of a retaliation claim are based upon RCW 49.60.210(1); Allison v. Hous. Auth., 118 Wn.2d 79, 821 P.2d 34 (1991); Lodis v. Corbis Holdings, Inc., 192 Wn.App. 30, 366 P.3d 1246 (2015), review denied, 185 Wn.2d 1038 (2016) ("Lodis II"); Boyd v. State, 187 Wn.App. 1, 349 P.3d 864 (2015); Lodis v. Corbis Holdings, Inc., 172 Wn.App. 835, 292 P.2d 779 (2013) ("Lodis I"); Milligan v. Thompson, 110 Wn.App. 628, 42 P.3d 418 (2002); Francom v. Costco Wholesale Corp., 98 Wn.App. 845, 991 P.2d 1182 (2000).

An adverse employment action will support an award of damages when "(1) [the employee] engaged in a statutorily protected activity, (2) the employer took an adverse employment action against the employee, and (3) there is a causal connection between the employee's activity and the employer's adverse action." Boyd v. State, 187 Wn.App. 1, 11–12, 349 P.3d 864 (2015) (citing Estevez v. Faculty Club of Univ. of

Washington, 129 Wn.App. 774, 120 P.3d 579 (2005)). See also Davis v. West One Automotive Group, 140 Wn.App. 449, 166 P.3d 807 (2007); Coville v. Cobarc Services, Inc., 73 Wn.App. 433, 869 P.2d 1103 (1994) (adding the term "opposition").

In Lodis v. Corbis Holdings, Inc., 172 Wn.App. 835, 292 P.3d 779 (Lodis I), the court held that a human resource director did not need to "step outside" his ordinary job duties in order to oppose alleged discrimination by the company's CEO. The court declined to follow federal precedent holding that human resource professionals doing their jobs were not engaged in protected oppositional activity. The Washington Law Against Discrimination's (WLAD) protections against retaliation extend beyond employees to independent contractors. Currier v. Northland Services, Inc., 182 Wn.App. 733, 332 P.3d 1006 (2014).

Protected activity. The employee must oppose "practices forbidden by this chapter," i.e., the law against discrimination, and opposition to a practice not forbidden by the statute is not protected activity. Coville v. Cobarc Servs., Inc., 73 Wn.App. 433, 440, 869 P.2d 1103 (1994). RCW 49.60.210(2) makes it unlawful for a government agency or government manager or supervisor to retaliate against a "whistleblower" as defined in RCW Chapter 42.40, however, unless the retaliation is for complaining of discrimination. The elements of a statutory "whistleblower" claim differ from those under RCW 49.60.210(1), and a different instruction should be used.

In Ellis v. City of Seattle, 142 Wn.2d 450, 13 P.3d 1065 (2000), the court held that to establish a RCW Chapter 49.60 claim of retaliation, the employee need only show he/she reasonably believed there was discrimination and complained about it, and need not prove actual discrimination.

Adverse employment action. Adverse employment actions involve a change in employment that is more than an inconvenience or alteration of one's job responsibilities. Boyd v. State, 187 Wn.App. 1. The distinction between an adverse employment action and a mere "inconvenience" or "alterations of one's job responsibilities" is not a bright line. See Alonso v. Qwest Commc'ns Co., LLC, 178 Wn.App. 734, 747, 315 P.3d 610 (2013) (whether loss of certain van and cellular phone benefits constituted adverse employment action is an issue of fact for the jury). Adverse employment actions may include: failure to promote, Davis v. Department of Labor and Industries, 94 Wn.2d 119, 615 P.2d 1279 (1980), reduction of pay, Kirby v. City of Tacoma, 124 Wn.App. 454, 98 P.3d 827 (2004), and demotion or transfer, Robel v. Roundup Corp., 148 Wn.2d 35, 59 P.3d 611 (2002).

An adverse employment action is one that would "dissuad[e] a reasonable worker from making or supporting a charge of discrimination." Burlington N. & Santa Fe Ry. Co. v. White, 548 U.S. 53, 68, 126 S.Ct.

2405, 165 L.Ed. 2d 345 (2006). See the Note on Use for WPI 330.06 (Retaliation—Adverse Employment Action—Definition).

One federal district court applying WLAD concluded Washington appellate courts would likely recognize a retaliatory hostile work environment claim. Trizuto v. Bellevue Police Department, 983 F.Supp.2d 1277 (W.D. Wash. 2013).

Substantial factor. An individual asserting a claim under this provision must prove a retaliatory motive was a "substantial factor" in the challenged decision, but need not prove it was the only factor or a "determining factor." Allison v. Housing Auth.,118 Wn.2d 79, 821 P.2d 34 (1991). Complaints about the conduct of a supervisor that do not allege discrimination are insufficient to impute knowledge of protected opposition to employer. Graves v. Dep't of Game, 76 Wn.App. 705, 712, 887 P.2d 424 (1994) (citing Wilmot v. Kaiser Aluminum & Chem. Corp., 118 Wn.2d 46, 69, 821 P.2d 18 (1991)).

[Current as of September 2018.]

WPI 330.06

RETALIATION—ADVERSE EMPLOYMENT ACTION—DEFINITION

The term "adverse" means unfavorable or disadvantageous. An employment action is adverse if it is harmful to the point that it would dissuade a reasonable employee from making a complaint of [discrimination] [harassment] [and] [or] [retaliation]. Whether a particular action is adverse is judged from the perspective of a reasonable person in the plaintiff's position.

NOTE ON USE

Use this instruction with WPI 330.05 (Employment Discrimination—Retaliation) when there is an issue whether the change is sufficiently adverse.

If both disparate treatment and retaliation are involved, combine the instruction with WPI 330.01.02 (Employment Discrimination—Disparate Treatment—Adverse Employment—Definition) to differentiate adverse employment action in disparate treatment claims from adverse employment action in retaliation claims.

COMMENT

In Burlington N. & Santa Fe Ry. Co. v. White, 548 U.S. 53, 67–68, 126 S.Ct. 2405, 165 L.Ed. 2d 345 (2006), the United States Supreme Court distinguished an adverse employment action in the context of a retaliation claim versus a disparate treatment claim. Whereas an adverse employment action for purposes of a disparate treatment claim must materially affect the terms and conditions of a person's employment, an adverse action in the context of a retaliation claim need not materially affect the terms and conditions of employment so long as a reasonable employee would have found the action materially adverse, which means it might have "dissuaded a reasonable worker from making or supporting a charge of discrimination" or deterred the charging party from engaging in protected activity. See also Ray v. Henderson, 217 F.3d 1234, 1241–43 (9th Cir. 2000); Trizuto v. Bellevue Police Dept., 983 F.Supp.2d 1277 (W.D. Wash. 2013).

In Tyner v. State, 137 Wn.App. 545, 564–65,154 P.3d 920 (2007), Washington first adopted Burlington N. & Santa Fe Ry. Co. v. White, 548 U.S. 53, 126 S.Ct. 2405, 165 L.Ed. 2d 345 (2006). The primary change in Tyner's work conditions was a reassignment. The court held

the crucial test was whether the change would dissuade a reasonable employee from making a complaint. The determination had to be based on the circumstances of the particular case.

Boyd v. Dep't of Soc. & Health Servs., 187 Wn.App. 1, 349 P.3d 864 (2015), followed *Tyner,* and explicitly approved an instruction that contained the second sentence of this instruction - that the action must be one that would dissuade a reasonable employee from making a complaint. *Boyd* likewise affirmed *Tyner* that whether the action at issue is adverse depends on the circumstances of the particular case because "context matters." Boyd v. Dep't of Soc. & Health Servs., 187 Wn.App. at 13. *Boyd* involved a series of actions, including a two-week suspension without pay, a written reprimand, and a report to the police. Without deciding whether each individual action was adverse, a reasonable jury could find that the actions, taken together, were adverse. The court further affirmed that adversity is assessed from a reasonable employee in plaintiff's position. Boyd v. Dep't of Soc. & Health Servs., 187 Wn.App. at 13–14.

[Current as of September 2018.]

WPI 330.21

WORKPLACE HARASSMENT—GENERAL

Harassment on the basis of [age] [creed] [disability] [marital status] [national origin] [race] [religion] [gender] [sexual orientation] [honorably discharged veteran status] [or] [military status] is unlawful employment discrimination.

NOTE ON USE

Use this instruction with WPI 330.22 (Sexual Harassment—Quid Pro Quo—Burden of Proof) or WPI 330.23 (Workplace Harassment—Hostile Work Environment—Burden of Proof).

When necessary to avoid confusion, "sex" may be substituted for "gender" in sex discrimination cases. Washington's law against discrimination specifically provides that "sex" and "gender" are interchangeable. RCW 49.60.040(25).

For a claim of sex discrimination other than sexual harassment, use WPI 330.01 (Employment Discrimination—Disparate Treatment—Burden of Proof).

COMMENT

The rules against workplace harassment under RCW Chapter 49.60 were developed primarily in sexual harassment cases. RCW 49.60.180(3) provides that it is an unfair practice for any employer to discriminate in terms or conditions of employment, which applies equally to harassment on the basis of gender, sexual orientation, race, age, religion, national origin, military status, disability, marital status, and the use of a dog guide or service animal, as well as actual or perceived HIV infection. See RCW 49.60.174; Robel v. Roundup Corp., 148 Wn.2d 35, 43, 59 P.3d 611 (2002); Glasgow v. Georgia-Pacific Corp., 103 Wn.2d 401, 404, 693 P.2d 708 (1985).

Washington has historically recognized two types of prohibited harassment under RCW Chapter 49.60: hostile work environment and quid pro quo harassment claims. See, e.g., DeWater v. State, 130 Wn.2d 128, 134, 921 P.2d 1059 (1996). Federal cases have questioned the utility of the distinction, tending to focus instead on whether a "tangible employment action" (as opposed to some other sort of change in the "terms and conditions" of employment) resulted from the harassment. See, e.g., Burlington Industries, Inc. v. Ellerth, 524 U.S. 742, 752–54, 765–66, 118 S.Ct. 2257, 141 L.Ed.2d 633 (1998). However, Washington

cases continue to distinguish between hostile work environment and quid pro quo harassment claims. See Antonius v. King County, 153 Wn.2d 256, 261, 103 P.3d 729 (2005); Washington v. Boeing Co., 105 Wn.App. 1, 9–10, 19 P.3d 1041 (2000); Henningsen v. Worldcom, Inc., 102 Wn.App. 828, 835–37, 9 P.3d 948 (2000).

Because of the nature of quid pro quo claims, they are likely to arise only in sex discrimination cases. But hostile work environment claims have been recognized in cases alleging discrimination on the basis of sex (Glasgow v. Georgia-Pacific Corp., 103 Wn.2d at 405–07), disability (Robel v. Roundup Corp., 148 Wn.2d at 43–45), and race (Washington v. Boeing Co., 105 Wn.App. at 12–13; Fisher v. Tacoma School Dist., 53 Wn.App. 591, 595, 769 P.2d 318 (1989)).

For a discussion of the protected categories for honorably discharged veteran status and military status, see the Comment to WPI 330.01 (Employment Discrimination—Disparate Treatment—Burden of Proof).

[Current as of September 2018.]

WPI 330.22

SEXUAL HARASSMENT—QUID PRO QUO—BURDEN OF PROOF

To establish [his] [her] claim of sexual harassment, (name of plaintiff) has the burden of proving each of the following propositions:

(1) That a [supervisor] [manager] subjected (name of plaintiff) to unwelcome sexual conduct or advances; and

(2) That the [supervisor] [manager] expressly or implicitly [promised] [threatened] a change in (name of plaintiff's) [status] [conditions] [if] [unless] (name of plaintiff) submitted to the conduct or advances.

If you find from your consideration of all of the evidence that each of these propositions has been proved, then your verdict should be for (name of plaintiff) [on this claim]. On the other hand, if any of these propositions has not been proved, then your verdict should be for (name of defendant) [on this claim].

NOTE ON USE

The bracketed alternatives in this instruction are not necessarily mutually exclusive.

For cases involving other verbal or physical conduct of a sexual nature, see WPI 330.23 (Workplace Harassment—Hostile Work Environment—Burden of Proof).

This instruction does not cover the claim of an individual who may claim quid pro quo sexual harassment by virtue of sexual advances toward other employees that affect the terms and conditions of the plaintiff's employment. A modified instruction should be prepared for such claims.

Use this instruction with WPI 330.21 (Workplace Harassment—General) in a "quid pro quo" sexual harassment case. The instruction must also be adapted for a case brought by a plaintiff other than the employee from whom the sexual favors were sought.

If the bracketed word "manager" is selected in this instruction, then also use the corresponding definition from the first sentence of WPI 330.24 (Harassment—Hostile Work Environment—"Manager" and "Management"—Definitions). There is no corresponding definition for "supervisor." See the Comment.

COMMENT

This instruction is adapted from DeWater v. State, 130 Wn.2d 128, 134–35, 921 P.2d 1059 (1996). *DeWater* does not require a tangible job benefit or detriment as an element of quid pro quo harassment. See 130 Wn.2d at 134–35. Nor does Schonauer v. DCR Entm't, Inc., 79 Wn.App. 808, 823 n.26, 905 P.2d 392 (1995); but see Henningsen v. Worldcom, Inc., 102 Wn.App. 828, 840, 9 P.3d 948 (2000); Thompson v. Berta Enterprises, Inc., 72 Wn.App. 531, 537 n.5, 864 P.2d 983 (1994).

In contrast to a hostile work environment case, the actor's conduct need not be pervasive; one incident may be sufficient to support a cause of action. Schonauer v. DCR Entm't, Inc., 79 Wn.App. 808, 823, 905 P.2d 392 (1995).

An employer is "strictly liable for quid pro quo harassment [by a supervisor who has] actual or apparent authority to make employment decisions on behalf of the employer." DeWater v. State, 130 Wn.2d 128, 135, 921 P.2d 1059 (1996).

The sexual favors sought by an employer or supervisor need not be for the employer or supervisor directly. Schonauer v. DCR Entm't, Inc., 79 Wn.App. at 823–24 (purpose behind harassment was to gratify customers).

EEOC Guidelines for Title VII, § 703, provide for the possibility of a quid pro quo sexual harassment suit by co-workers of an individual shown "sexual favoritism," at least when it is based on submission to explicit or implicit coercive requests for sexual favors as opposed to voluntary romantic relationships. See 29 C.F.R. § 1604.11(g), and EEOC Policy Guide on Employer Liability for Sexual Favoritism under Title VII (1990), 405 Fair Employment Practices 6817, and federal cases cited therein.

While there are no decisions under RCW Chapter 49.60 that define "supervisor," courts have indicated a supervisor is lower than a managerin an employer's hierarchy. See Glasgow v. Georgia-Pacific Corp., 103 Wn.2d 401, 407, 693 P.2d 708 (1985); Henningsen v. Worldcom, Inc., 102 Wn.App. 828, 838, 9 P.3d 948 (2000).

Relying on Vance v. Ball State,570 U.S. 421, 133 S.Ct. 2434, 186 L.Ed.2d 565 (2013), the court in Ellorin v. Applied Finishing, Inc., 996

F.Supp. 2d 1070, 1084–85 (W.D. Wash. 2014) defined a supervisor as a person who could play a significant, possibly determinative role in such matters as hiring, firing, failing to promote or reassignment with significantly different responsibilities.

[Current as of September 2018.]

WPI 330.23

WORKPLACE HARASSMENT—HOSTILE WORK ENVIRONMENT—BURDEN OF PROOF

To establish [his] [her] claim of harassment on the basis of [age] [creed] [disability] [marital status] [national origin] [race] [religion] [gender] [sexual orientation] [honorably discharged veteran status] [military status], (name of plaintiff) has the burden of proving each of the following propositions:

(1) That there was language or conduct [concerning age] [concerning creed] [concerning a disability] [concerning marital status] [concerning national origin] [concerning sexual orientation] [concerning honorably discharged veteran status] [concerning military status] [of a racial nature] [of a religious nature] [of a sexual nature], or that occurred because of the plaintiff's [age] [creed] [disability] [marital status] [national origin] [race] [religion] [gender] [sexual orientation] [honorably discharged veteran status] [military status];

(2) That this language or conduct was unwelcome in the sense that (name of plaintiff) regarded the conduct as undesirable and offensive, and did not solicit or incite it;

(3) That this conduct or language was so offensive or pervasive that it altered the conditions of (name of plaintiff's) employment; and

(4) Either:

(a) That an owner, manager, partner, or corporate officer of (name of employer) participated in the conduct or language; or

(b) That management knew, through complaints

or other circumstances, of this conduct or language, and (name of employer) **failed to take reasonably prompt and adequate corrective action reasonably designed to end it; or**

(c) That management should have known of this harassment, because it was so pervasive or through other circumstances, and (name of employer) **failed to take reasonably prompt and adequate corrective action reasonably designed to end it.**

If you find from your consideration of all of the evidence that each of these propositions has been proved, then your verdict should be for (name of plaintiff) **[on this claim]. On the other hand, if any of these propositions has not been proved, your verdict should be for** (name of defendant) **[on this claim].**

NOTE ON USE

Use this instruction with WPI 330.21 (Workplace Harassment—General) in a "hostile work environment" harassment case.

When the harassment is alleged to be on the basis of age, add the following proposition: "That the plaintiff was 40 years of age or older." See RCW 49.60.205 and 49.44.090.

When the harassment is alleged to be on the basis of disability, add the following proposition: "That the plaintiff had a disability." See Robel v. Roundup Corp., 148 Wn.2d 35, 45, 59 P.3d 611 (2002). "Disability" should be defined using WPI 330.31 (Disability Discrimination—Definition of Disability—Disparate Treatment Cases).

When the harassment is alleged to be on the basis of actual or perceived HIV infection, or actual or perceived hepatitis C infection, add the following proposition: "That plaintiff had an actual or perceived HIV (or hepatitis C) infection." See RCW 49.60.174(1). No such additional proposition is necessary for harassment alleged to be on the basis of race, sex, religion, creed, national origin, or marital status.

When necessary to avoid confusion, "sex" may be substituted for "gender" in sex discrimination cases. Washington's law against discrimination specifically provides that "sex" and "gender" are interchangeable. RCW 49.60.040(25).

Use this instruction with WPI 21.01 (Meaning of Burden of Proof—Preponderance of the Evidence).

COMMENT

This instruction is based upon RCW 49.60.180(3) and Glasgow v. Georgia-Pacific Corp., 103 Wn.2d 401, 693 P.2d 708 (1985). The WPI Committee has broadened the instruction to apply to workplace harassment generally, rather than merely to sexual harassment. See discussion in the Comment to WPI 330.21 (Workplace Harassment—General).

The first requirement of a workplace harassment claim, as *Glasgow* explains, is that "the conduct complained of must be unwelcome in the sense that the plaintiff-employee did not solicit or incite it, and in the further sense that the employee regarded the conduct as unwelcome." Glasgow v. Georgia-Pacific Corp., 103 Wn.2d at 406.

Second, the employee must prove the conduct was because of plaintiff's membership in a protected class. For example, if the protected class is gender, the plaintiff must prove that theconduct would not have occurred had the employee been of a different sex. Schonauer v. DCR Entertainment, Inc., 79 Wn.App. 808, 820, 905 P.2d 392 (1995) (citing *Glasgow*).In such a case, gender must be the "motivating factor" for the conduct. Payne v. Children's Home Soc. of Washington, Inc., 77 Wn.App. 507, 513, 892 P.2d 1102 (1995); Coville v. Cobarc Services, Inc., 73 Wn.App. 433, 869 P.2d 1103 (1994). As long as the conduct is "because of sex," it need not be "sexual in nature" or "involve sexual advances, innuendo, or physical conduct to be actionable." Payne v. Children's Home Soc., 77 Wn.App. at 512–13. Same-sex harassment is illegal when it is "because of sex." Oncale v. Sundowner Offshore Services, 523 U.S. 75, 118 S.Ct. 998, 140 L.Ed.2d 201 (1998) (Title VII case).

Similarly, if the harassment is based on membership in another protected class such as disability, the conduct or language "directly or proximately related to" a disability is "because of" a disability. Robel v. Roundup Corp., 148 Wn.2d 35, 45–46, 59 P.3d 611 (2002).

Third, the employee must prove the conduct affected his or her terms or conditions of employment. Conduct affects the terms or conditions of employment "if it is 'sufficiently pervasive so as to alter the conditions of employment and create an abusive working environment.' " Glasgow v. Georgia-Pacific Corp., 103 Wn.2d 401, 406, 693 P.2d 708 (1985). Whether conduct meets this test depends on the "totality of the circumstances," Glasgow v. Georgia-Pacific Corp., 103 Wn.2d at 407, "including the frequency and severity of harassing conduct, whether it was physically threatening or humiliating or merely an offensive utterance, and whether it unreasonably interfered with the employee's work performance." Davis v. Fred's Applicance, Inc., 171 Wn.App. 348, 362,

287 P.3d 51 (2012); Schonauer v. DCR Entm't, Inc., 79 Wn.App. 808, 820–21 (quoting Harris v. Forklift Systems, 510 U.S. 17, 20, 114 S.Ct. 367, 370, 126 L.Ed.2d 295 (1993)); Graves v. Department of Game, 76 Wn.App. 705, 887 P.2d 424 (1994) (conduct insufficiently pervasive or abusive to affect emotional or psychological wellbeing of employee).

See also Arthur v. Whitman County, 24 F.Supp.3d 1024 (E.D. Wash. 2014) (a hostile work environment claim may be composed of a series of separate acts that collectively constitute one unlawful employment practice); Trizuto v. Bellevue Police Dept., 983 F.Supp.2d 1277 (W.D. Wash. 2013); Blackburn v. Dep't of Soc. & Health Serv., 186 Wn.2d 250, 375 P.3d 1076 (2016) (a single weekend staffing decision based on race is not sufficiently severe or pervasive); Estevez v. Faculty Club of Univ. of Wash., 129 Wn.App. 774, 793, 120 P.3d 579 (2005).

Fourth, to establish employer liability:

> the employee must prove that the conduct is imputable to the employer. Conduct is imputable to the employer if it is the conduct of an owner, manager, partner, or corporate officer, or, alternatively, if it is the conduct of a supervisor which the employer authorized, knew of, or should have known of, and the employer "failed to take reasonably prompt and adequate corrective action."

Schonauer v. DCR Entm't, Inc., 79 Wn.App. at 821 (quoting Glasgow v. Georgia-Pacific Corp., 103 Wn.2d at 407). Cf. Thompson v. Berta Enterprises, Inc., Inc., 72 Wn.App. 531, 864 P.2d 983 (insufficient evidence employer knew or should have known).

Washington cases appear to use the terms supervisor or manager interchangeably. In Davis v. Fred's Appliance, Inc., 171 Wn.App. 348, 362–63, 287 P.3d 51 (2012), the court injected a new term of "alter ego" to automatically impute liability to the employer. The distinction between the various labels is unclear. See the Comment to WPI 330.24 (Harassment—Hostile Work Environment—"Manager" and "Management"—Definitions).

Finally, note that the distinction between quid pro quo and hostile work environment sexual harassment may not be precise, especially if implicit quid pro quo harassment is alleged. See Nichols v. Frank, 42 F.3d 503 (9th Cir. 1994).

For a discussion of the protected categories for honorably discharged veteran status and military status, see the Comment to WPI 330.01 (Employment Discrimination—Disparate Treatment—Burden of Proof).

[Current as of September 2018.]

WPI 330.24

HARASSMENT—HOSTILE WORK ENVIRONMENT—"MANAGER" AND "MANAGEMENT"—DEFINITIONS

A "manager" is a person who has the authority and power to affect hours, wages, and working conditions. "Management" means one or more managers.

NOTE ON USE

Use this instruction with WPI 330.23 (Workplace Harassment—Hostile Work Environment—Burden of Proof).

The first sentence of this instruction may also be used along with WPI 330.22 (Sexual Harassment—Quid Pro Quo—Burden of Proof). See the Note on Use to WPI 330.22 (Sexual Harassment—Quid Pro Quo—Burden of Proof).

COMMENT

This instruction is drawn from Robel v. Roundup Corp., 148 Wn.2d 35, 48 n.5, 59 P.3d 611 (2002) ("[m]anagers are those to whom the employer has given authority and power to affect the hours, wages and working conditions of the employer's workers"). See also Francom v. Costco Wholesale Corp., 98 Wn.App. 845, 991 P.2d 1182 (2000); Alonzo v. Qwest Communications Co., LLC, 178 Wn.App. 734, 752, 315 P.3d 610 (2013); Hotchkiss v. CSK Auto Inc., 918 F.Supp. 2d 1108, 1119–120 (E.D. Wash. 2013) (citing Washington v. Boeing, 105 Wn.App. 1, 11, 19 P.3d 1041 (2000)).

For additional discussion of the manager and supervisor distinction, if any, see Comment to WPI 330.23 (Workplace Harassment—Hostile Work Environment—Burden of Proof).

[Current as of September 2018.]

WPI 330.31

DISABILITY DISCRIMINATION—DEFINITION OF DISABILITY—DISPARATE TREATMENT CASES

A disability is a sensory, mental, or physical impairment that:

(1) Is medically recognized or diagnosable; or

(2) Exists as a record or history [; or]

[(3) Is perceived by the employer to exist, whether or not it exists in fact].

[A disability may exist whether it is temporary or permanent, common or uncommon, mitigated or unmitigated, whether or not it limits the ability to work generally or work at a particular job, or whether or not it limits any other activity.]

NOTE ON USE

Use this instruction with either WPI 330.32 (Disability Discrimination—Treatment—Burden of Proof) or WPI 330.33 (Disability Discrimination—Reasonable Accommodation—Burden of Proof). Use the bracketed final sentence if it will be helpful to the jury. See discussion in the Comment.

If there is a claim brought under the Americans with Disabilities Act (ADA), use the definition of "disability" in the ADA at 42 U.S.C. § 12102. See discussion in the Comment regardingthe definition of disability under the ADA Amendments Act of 2008.

COMMENT

This instruction is derived from RCW 49.60.040(7).

This instruction wasrevised inthe 2017–2018 Supplement to 6A Washington Practice, Washington Pattern Jury Instructions: Civil (6th ed.) to change the phrasing in subsection three to remove redundancy.

Disability discrimination. RCW 49.60.180 provides that it is an unfair practice for an employer to discriminate in various employment

decisions "because of . . . the presence of any sensory, mental, or physical disability . . . ." RCW 49.60.180(1), (2), (3), and (4).

Liability in a disparate treatment case may be based upon the employer's perception that the plaintiff is disabled. Clipse v. Commercial Driver Servs., Inc. 189 Wn.App. 776, 794, 358 P.3d 464 (2015); Barnes v. Washington Natural Gas Co., 22 Wn.App. 576, 591 P.2d 461 (1979).

Conditions do not need to be permanent in order to qualify as disabilities. RCW 49.60.040(7)(b). See Pulcino v. Federal Express Corp., 141 Wn.2d 629, 643–44, 9 P.3d 797 (2000).

Definition of disability. Currently, the definitions of "disability" under state and federal law differ. Compare RCW 49.60.040(7)(a) to (c) with the ADA Amendments Act of 2008, 42 U.S.C. § 12102. The ADA defines disability as: "(A) a physical or mental impairment that substantially limits one or more major life activities of such individual; (B) a record of such an impairment; or (C) being regarded as having such an impairment." In comparison, the definition of "disability" under Washington's Law Against Discrimination (WLAD) is broader and provides additional protections to Washington employees. See Hale v. Wellpinit School Dist. No. 49, 165 Wn.2d 494, 501–02, 198 P.3d 1021 (2009) (acknowledging that the Washington legislature in adopting its definition of "disability" in 2007 specifically intended to employ a broader definition of "disability" and that "the [Washington] Law Against Discrimination affords to state residents protections that are wholly independent of those afforded by the federal Americans with Disabilities Act . . .").

For additional information about the statutory definition of "disability" and its application under Washington law, please refer to RCW 49.60.040(7) and the Washington State Human Rights Commission's website at www.hum.wa.gov.

Pregnancy. Claims of pregnancy discrimination are analyzed under a gender discrimination rather than a disability framework. Hegwine v. Longview Fibre Co., 162 Wn.2d 340, 350, 172 P.3d 688 (2007). The Human Rights Commission website (www.hum.wa.gov) has a useful discussion of what may or may not constitute a disability under Washington law.

[Current as of September 2018.]

WPI 330.31.01

DISABILITY DISCRIMINATION—DEFINITION OF IMPAIRMENT

An impairment includes [but is not limited to]:

[a] [physiological disorder], [or] [condition], [cosmetic disfigurement], [or] [anatomical loss] affecting one [or more of] the following body system[s]: [neurological], [musculo-skeletal], [special sense organs], [respiratory], [including speech organs], [cardio-vascular], [reproductive], [digestive], [genitor-urinary], [hemic and lymphatic], [skin], [and] [endocrine][; or]

[any [mental], [developmental], [traumatic], [or] [psychological] disorder including [but not limited to] [cognitive limitation], [organic brain syndrome], [emotional or mental illness], [and] [specific learning disabilities]].

NOTE ON USE

The definition of "impairment" found at RCW 49.60.040(7)(c) should be used with both treatment and accommodation cases. See also WPI 330.33 (Disability Discrimination—Reasonable Accommodation—Burden of Proof) for the impairment instruction in accommodation cases.

Use the bracketed language as appropriate for the type of impairment claimed.

COMMENT

This instruction was modified in the 2017–2018 Supplement to 6A Washington Practice, Washington Pattern Jury Instructions: Civil (6th ed.) to bracket specific types of conditions so as to allow for the modification of the instruction to fit the type of impairment claimed.

The definition of "impairment" is now codified in RCW 49.60.040(7)(c) and should be used with WPI 330.31 (Disability Discrimination—Definition of Disability—Disparate Treatment Cases) and WPI 330.33 (Disability Discrimination—Reasonable Accommodation—Burden of Proof).

An impairment may be temporary, common or uncommon, mitigated or unmitigated, and, for purposes of disparate treatment, an impairment need not limit the ability to work generally or to work at a particular job whether or not it limits other activities covered by RCW Chapter 49.60. RCW 49.60.040(7)(b).

In Clipse v. Commercial Driver Servs., Inc., 189 Wn.App. 776, 792–93, 358 P.3d 464 (2015), the court affirmed a jury verdict in favor of a plaintiff who had been denied employment as a truck driver instructor because of his use of the prescription drug methadone. In addressing the question of whether methadone use constituted a "disability" under the Washington Law Against Discrimination (WLAD), the court held that the use of prescription medications may constitute a "disability" under the WLAD if the medications cause physically impairing side effects.

Since the adoption of the definition of "impairment," there has been no Washington case law addressing the question of whether particular attributes such as a person's height or weight (e.g., obesity) may constitute an "impairment." The federal court noted this absence of authority in Taylor v. Burlington N. R.R. Holdings, Inc., No. C11-1289JLR, 2016 WL 632077, at *5 (W.D. Wash. 2016), appeal filed, No. 16–35205 (9th Cir. March 18, 2016). Consistent with the majority of courts to address the issue, the *Taylor* court held that obesity is a disability only when it is the result of a physiological condition or disorder.

[Current as of September 2018.]

WPI 330.32

DISABILITY DISCRIMINATION—TREATMENT—BURDEN OF PROOF

Discrimination in employment on the basis of disability is prohibited.

To establish [his] [her] claim of discrimination on the basis of disability, (name of plaintiff) **has the burden of proving each of the following propositions:**

(1) That [he] [she] [has a disability] [or] [is perceived to have a disability];

(2) That [he] [she] is able to perform the essential functions of the job in question [with reasonable accommodation]; and

(3) That [his] [her] [disability] [or] [the perception of [his] [her] disability] was a substantial factor in (name of defendant's) **decision [to terminate] [not to promote] [not to hire] [him] [her] [to lay [him] [her] off].** (Name of plaintiff) **does not have to prove that [perceived] disability was the only factor or the main factor in the decision. Nor does** (name of plaintiff) **have to prove that [he] [she] would have been [retained] [hired] [promoted] but for [his] [her] [perceived] disability.**

If you find from your consideration of all of the evidence that each of these propositions has been proved, then your verdict should be for (name of plaintiff) **[on this claim]. On the other hand, if any of these propositions has not been proved, your verdict should be for** (name of defendant) **[on this claim].**

NOTE ON USE

Use this instruction, rather than WPI 330.01 (Employment Discrimination—Disparate Treatment—Burden of Proof), in a case of discriminatory treatment when the basis of the claim is disability.

Use WPI 330.31 (Disability Discrimination—Definition of Disability—Disparate Treatment Cases) and WPI 330.31.01 (Disability Discrimination—Definition of Impairment) with this instruction.

In a "reasonable accommodation" case in which the primary allegation is that the employer has not met its obligation to accommodate the disability, use WPI 330.33 (Disability Discrimination—Reasonable Accommodation—Burden of Proof), and accompanying instructions, instead of this instruction.

A separate "essential functions" instruction may be appropriate, depending on the facts and circumstances of the particular case. See WPI 330.37 (Essential Function—Definition); also see the Comment below for a discussion of essential functions.

Use the bracketed words as appropriate for the type of claim being made. In proposition (2), use the bracketed phrase "with reasonable accommodation" and the definition of reasonable accommodation in WPI 330.34 (Disability Discrimination—Reasonable Accommodation—Definition) if, in order to make a threshold showing of qualification for the position, the plaintiff must show that he or she could perform the job's essential functions with reasonable accommodation. The phrase and definition of reasonable accommodation will not be used if the plaintiff does not assert that accommodation would be necessary. If the employer presents evidence of undue hardship, the jury must be instructed on undue hardship. See WPI 330.36 (Disability Discrimination—Undue Hardship).

In some circumstances, it may be appropriate to give WPI 330.04 (Employment Discrimination—Bona Fide Occupational Qualification (BFOQ) Defense) with this instruction. See the Comment below.

COMMENT

Discriminatory treatment due to disability. Most reported Washington cases of employment discrimination based on disability involve issues of reasonable accommodation. Those issues are addressed later in this chapter. For case law discussion about other issues related to disability discrimination cases, see Hegwine v. Longview Fibre Co., 162 Wn.2d 340, 172 P.3d 688 (2007); Roeber v. Dowty Aerospace Yakima, 116 Wn.App. 127, 64 P.3d 691 (2003); Bass v. City of Tacoma, 90 Wn.App. 681, 953 P.2d 129, 976 P.2d 1248 (1998); Parsons v. St.

Joseph's Hosp. and Health Care Center, 70 Wn.App. 804, 856 P.2d 702 (1993); Barnes v. Washington Natural Gas Co., 22 Wn.App. 576, 591 P.2d 461 (1979). See also WAC 162-16-240 on bona fide occupational requirements.

In Johnson v. Chevron U.S.A., Inc., 159 Wn.App. 18, 33–34, 244 P.3d 438 (2010), the court disapproved of a jury instruction which included a requirement that the plaintiff prove that he was "treated differently" from non-disabled employees:

> Proof of different treatment by way of comparator evidence is relevant and admissible but not required, and in many cases is not obtainable. Disability cases in particular often involve situations where, because of the unique nature of the disability, there is no relevant comparison evidence. Indeed, requiring a disability plaintiff to prove he was treated differently from nondisabled employees contradicts the employer's affirmative obligation to treat that employee differently by offering accommodation.

Motive or intent to discriminate. In Parsons v. St. Joseph's Hosp. and Health Care Center, 70 Wn.App. 804, 856 P.2d 702 (1993), the plaintiff claimed she had been fired because of her disability. The employer responded that she was fired due to unsatisfactory job performance. The court distinguished the case from one in which the plaintiff claimed that the employer had failed to make reasonable accommodation for her disability, i.e., that the employer should have treated her differently from other employees. Rather, "the central issue . . . is whether St. Joseph's acted with a discriminatory motive or intent." Parsons v. St. Joseph's Hosp., 70 Wn.App. at 807.

"Perceived as." If an employer perceives an employee to have a disability and treats the employee adversely based on that perception, the employee can establish a disparate treatment claim even though the employee is not in fact disabled. Barnes v. Washington Natural Gas Co., 22 Wn.App. 576, 591 P.2d 461 (1979). See WPI 330.31 (Disability Discrimination—Definition of Disability—Disparate Treatment Cases).

Substantial factor. In MacKay v. Acorn Custom Cabinetry, Inc., 127 Wn.2d 302, 898 P.2d 284 (1995), the court held that the "substantial factor" test, rather than a "determining factor" test, was the appropriate standard for deciding whether an employer's adverse employment decision was "because of" one of the prohibited factors enumerated in RCW 49.60.180(2), including disability. See Comment to WPI 330.01 (Discrimination—Disparate Treatment—Burden of Proof).

Note that disability claims brought under the Americans with Disabilities Act (ADA) require a plaintiff to prove that "but for" the illicit motive of a disability, he or she would not have been subjected to the adverse job action. See Brownfield v. City of Yakima, 178 Wn.App. 850,

872–73, 316 P.3d 520, 532 (2014), addressing the distinction between the plaintiff's burden in claims brought under the ADA versus claims brought under the Washington Law Against Discrimination (WLAD).

Bona fide occupational qualifications (BFOQ). See WPI 330.04 (Employment Discrimination—Bona Fide Occupational Qualification (BFOQ) Defense). See Brady v. Daily World, 105 Wn.2d 770, 777, 718 P.2d 785 (1986), overruled on other grounds byHill v. BCTI Income Fund–I, 144 Wn.2d 172, 188n.10, 23 P.3d 440 (2001); and Blanchette v. Spokane County Fire Protection Dist. No. 1, 67 Wn.App. 499, 836 P.2d 858 (1992). See also Kries v. WA-SPOK Primary Care, LLC, 190 Wn.App. 98, 129, 362 P.3d 974, 988 (2015), in which the court held that the BFOQ defense may be available in a discharge case as well as a refusal to hire case.

In Davis v. Microsoft Corp., 149 Wn.2d 521, 70 P.3d 126 (2003) the employer established that working overtime was an essential function of the position, but the court's opinion does not discuss whether the employer's proof also met the definition of a bona fide occupational qualification.

The court noted in Fey v. State, 174 Wn.App. 435, 447–48, 300 P.3d 435 (2013), that an employer relying on a BFOQ defense to justify a facially discriminatory qualification:

> must either have a factual basis for believing that all or substantially all persons who lack the qualification would be unable to safely and efficiently perform the duties of the job, or beable to prove that some excluded employees would be unable to perform safely and efficiently and it is impossible or highly impractical for the employer to distinguish the employees who do or do not present the risk.

In some cases, it may be appropriate to instruct jurors more specifically as to "essential functions." See, e.g., Hegwine v. Longview Fibre Co., 162 Wn.2d 340, 172 P.3d 688 (2007); Davis v. Microsoft Corp., 149 Wn.2d 521, 70 P.3d 126 (2003); Griffith v. Boise Cascade, Inc., 111 Wn.App. 436, 45 P.3d 589 (2002); Tinjum v. Atlantic Richfield Co., 109 Wn.App. 203, 34 P.3d 855 (2001); Dedman v. Washington Personnel Appeals Board, 98 Wn.App. 471, 989 P.2d 1214 (1999). See WPI 330.37 (Essential Function—Definition).

Undue hardship. If the employer presents evidence of undue hardship, the jury must be instructed on undue hardship. Easley v. Sea-Land Service, Inc., 99 Wn.App. 459, 464, 469–72,994 P.2d 271 (2000); see WPI 330.36 (Disability Discrimination—Undue Hardship).

Business judgment rule. Under the business judgment rule, the jury is not allowed to second-guess the defendant's business judgment

and the jury may impose liability only for discriminatory conduct, not for conduct that was otherwise unreasonable or unfair. The trial court need not separately instruct the jury on the business judgment rule as long as the other instructions accurately state the essential elements of disability discrimination—the business judgment rule "add[s] nothing" to these essential elements. Burchfiel v. Boeing Corp., 149 Wn.App. 468, 491–93, 205 P.3d 145 (2009).

[Current as of September 2018.]

WPI 330.33

DISABILITY DISCRIMINATION—REASONABLE ACCOMMODATION—BURDEN OF PROOF

Discrimination in employment on the basis of disability is prohibited. One form of unlawful discrimination is a failure to reasonably accommodate an employee's disability.

To establish [his] [her] claim of discrimination on the basis of failure to reasonably accommodate a disability, (name of plaintiff) has the burden of proving each of the following propositions:

(1) That [he] [she] had an impairment that is medically recognizable or diagnosable or exists as a record or history; and

(2) That either

(a) the employee gave the employer notice of the impairment; or

(b) no notice was required to be given because the employer knew about the employee's impairment; and

(3) That either:

(a) the impairment [has] [had] a substantially limiting effect on

(i) [his] [her] ability to [perform his or her job] [apply for a job] [be considered for a job]; or

(ii) [his] [her] ability to access [equal benefits] [privileges] [terms] [or] [conditions] of employment; or

(b) (name of plaintiff) has provided medical documentation to the employer establishing a reasonable likelihood that working without an accommodation would aggravate the impairment to the extent it would create a substantially limiting effect;

and

(4) That [he] [she] would have been able to perform the essential functions of the job in question with reasonable accommodation; and

(5) That the employer failed to reasonably accommodate the impairment.

In determining whether an impairment has a substantially limiting effect, a limitation is not substantial if it has only a trivial effect.

If you find from your consideration of all of the evidence that each of these propositions has been proved, then your verdict should be for the plaintiff [on this claim]. On the other hand, if any of these propositions has not been proved, your verdict should be for the employer[on this claim].

NOTE ON USE

Use this instruction with WPI 330.31 (Disability Discrimination—Definition of Disability—Disparate Treatment Cases). This instruction is designed to be used together with WPI 330.34 (Disability Discrimination—Reasonable Accommodation—Definition) and WPI 330.37 (Essential Function—Definition) or, alternatively, WPI 330.36 (Disability Discrimination—Undue Hardship).

When the plaintiff also makes a claim of disparate treatment based on disability, also use this instruction, rather than WPI 330.01 (Employment Discrimination—Disparate Treatment—Burden of Proof).

An essential functions instruction may be appropriate depending on the facts and circumstances of the particular case. When there is a disagreement as to the essential functions of the position, use WPI 330.37 (Essential Function—Definition).

This instruction may need to be modified for cases involving medical necessity. See discussion in the Comment below.

COMMENT

In 2007, the Legislature adopted new definitions of disability and impairment in an accommodation analysis. RCW 49.60.040(7). See discussion in the Comment to WPI 330.01 (Employment Discrimination—Disparate Treatment—Burden of Proof).

For purposes of an accommodation analysis, "a limitation is not substantial if it has only a trivial effect." RCW 49.60.040(7)(e).

When duty to accommodate arises. Pursuant to RCW 49.60.040(7)(d), the duty to accommodate arises in two general circumstances: (1) when the impairment has a substantially limiting effect on the employee's ability to perform the duties of the position or affect other aspects of his/her employment opportunities; or (2) when there is medical evidence that failure to accommodate a known impairment will aggravate the impairment, limiting the employee's ability to perform the job or affect other aspects of his/her employment opportunities. See Johnson v. Chevron U.S.A., Inc., 159 Wn.App. 18, 30, 244 P.3d 438, 444 (2010):

> Under the new statute, the question is not whether the accommodation was "medically necessary" in order for Johnson to do his job, . . . Instead, it is whether Johnson's impairment had a substantially limiting effect upon his ability to perform the job such that the accommodation was reasonably necessary, or doing the job without accommodation was likely to aggravate the impairment such that it became substantially limiting.

In impairment cases, the Legislature clarified that the impairment must have a substantially limiting effect upon the individual's ability to perform his or her job, the individual's ability to apply for or be considered for a position, or the individual's access to equal benefits, privileges, or terms or conditions of employment, RCW 49.60.040(7)(d)(i). In the aggravation of impairment cases, the employee must notify the employer of the impairment, and provide medical documentation that establishes a reasonable likelihood that engaging in the employee's job function without an accommodation "would aggravate the impairment to the extent, that it would create a substantially limiting effect." RCW 49.60.040(7)(d)(ii).

The duty of reasonable accommodation does not arise until the employer is "aware of respondent's disability and physical limitations." Goodman v. Boeing Co., 127 Wn.2d 401, 408, 899 P.2d 1265 (1995) (quoting Holland v. Boeing Co., 90 Wn.2d 384, 391, 583 P.2d 621 (1978)).

If the disability is not otherwise known to the employer, the employee must give the employer notice of the disability; the employer then must take " 'positive steps' to accommodate the employee's limitations." Goodman v. Boeing Co., 127 Wn.2d at 408. Once notice is given, the employer has a duty to inquire regarding the nature and extent of the disability, while the employee has a duty to cooperate with the employer's efforts by explaining the employee's disability and qualifications. Goodman v. Boeing Co., 127 Wn.2d at 408–09; Hume v. American Disposal Co., 124 Wn.2d 656, 880 P.2d 988 (1994).

If there is a factual question whether the parties cooperated in the reasonable accommodation process, Washington law is unclear how non-cooperation impacts the burden of proof. See Comment to WPI 330.34 (Disability Discrimination—Reasonable Accommodation—Definition).

Damages. In Martini v. Boeing, 137 Wn.2d 357, 367, 971 P.2d 45 (1999), the Washington Supreme Court held that an employee who resigned because of a failure to accommodate a disability was not required to prove constructive discharge before being entitled to damages under RCW 49.60.030(2). A plaintiff bringing a claim under RCW Chapter 49.60 need only establish that the damages were proximately caused by the discrimination. Martini v. Boeing, 137 Wn.2d at 368.

[Current as of September 2018.]

WPI 330.34

DISABILITY DISCRIMINATION—REASONABLE ACCOMMODATION—DEFINITION

A reasonable accommodation is a measure that

[enables equal opportunity in the job application process;]

[enables the proper performance of the essential job functions;] [or]

[enables the enjoyment of equal benefits, privileges, or terms and conditions of employment that are available to employees without disabilities.]

Once an employer is on notice of an impairment, the employer has a duty to inquire about the nature and extent of the impairment. The [employee] [applicant] has a duty to cooperate with [his] [her] employer to explain the nature and extent of the [employee's] [applicant's] impairment and resulting limitations as well as [his] [her] qualifications.

An employer must provide a reasonable accommodation for [a qualified applicant] [an employee] with a disability unless the employer can show that the accommodation would impose an undue hardship on the employer. The obligation to reasonably accommodate applies to all aspects of employment, and an employer cannot deny an employment opportunity to a qualified applicant or employee because of the need to provide reasonable accommodation.

[There may be more than one reasonable accommodation of a disability.]Where multiple potential modes of accommodation exist, the employer is entitled to select the mode of accommodation to the exclusion of other choices, if the accommodation is adequate.]

[An employer is not required to reassign an employee to a position that is already occupied, create a new position, or eliminate or reassign essential job functions as a reasonable accommodation.]

[The duty to accommodate is continuing. If an employer's first attempt at accommodation fails, it must continue to attempt modes of accommodation unless it can demonstrate that remaining modes of accommodation constitute an undue hardship. An employer's previously unsuccessful attempts at accommodation do not give rise to liability if the employer ultimately provides a reasonable accommodation.]

[A reasonable accommodation may include adjustments in the manner in which essential functions are carried out, work schedules, scope of work, and changes in the job setting or conditions of employment that enable the person to perform the essential functions of the job.]

NOTE ON USE

The bracketed paragraphs are to be used in an appropriate case when there is a disagreement as to which of several accommodations might be considered reasonable, or when multiple modes of accommodation are attempted.

The list of accommodations in the instruction's final paragraph is not exclusive.

Use this instruction together with WPI 330.33 (Disability Discrimination—Reasonable Accommodation—Burden of Proof), and in appropriate cases with WPI 330.36 (Disability Discrimination—Undue Hardship) and WPI 330.37 (Essential Function—Definition).

COMMENT

This instruction was revised in the 2017–2018 Supplement to 6A Washington Practice, Washington Pattern Jury Instructions: Civil (6th ed.). The first paragraph was added so that the definition of "reasonable accommodation" in WAC 162-22-065 was included inthe instruction.

The first bracketed paragraph has been revised to add the final sentence to clarify that when there are multiple modes of accommodat-

ing a disability, the employer may choose the accommodation. See Frisino v. Seattle Sch. Dist. No. 1, 160 Wn.App. 765, 779, 249 P.3d 1044 (2011) (citing Griffith v. Boise Cascade, Inc., 111 Wn.App. 436, 444, 45 P.3d 589 (2002)). See also Doe v. Boeing Co., 121 Wn.2d 8, 846 P.2d 531 (1993), in which the court stated that "the Act does not require the employer to offer the precise accommodation which [the plaintiff] requests." Doe v. Boeing Co., 121 Wn.2d at 20.

The second bracketed paragraph was added to clarify that employers are not required to reassign an employee to a position that is already filled, to create a new position, or to eliminate or reassign essential job functions. Pulcino v. Fed. Express Corp., 141 Wn.2d 629, 644, 9 P.3d 787 (2000) ("[a]n employer . . . is not required . . . to create a new position, to alter the fundamental nature of the job, or to eliminate or reassign essential job functions").

The third bracketed paragraph was added to clarify that the accommodation process is a continuing one, and that an employer may attempt different modes of accommodation unless remaining modes of accommodation constitute an undue hardship. An employer will not be liable for failing to accommodate if it ultimately provides a reasonable accommodation, even though original attempts at accommodation were unsuccessful. See Frisino v. Seattle Sch. Dist. No. 1, 160 Wn.App. 765, 781, 249 P.3d 1044 (2011), citing Sharpe v. Am. Tel. & Tel. Co., 66 F.3d 1045, 1051 (9th Cir. 1995).

If an employee becomes disabled and cannot be accommodated in his or her position, the employer must take affirmative steps to help the employee identify and apply for any vacant position for which the employee is qualified. Davis v. Microsoft Corp., 149 Wn.2d 521, 536–37, 70 P.3d 126 (2003); Clarke v. Shoreline School Dist. No. 412, 106 Wn.2d 102, 120, 720 P.2d 793 (1986); Dean v. Mun. of Metro. Seattle, 104 Wn.2d 627, 636, 708 P.2d 393 (1985); see also Havlina v. Dep't. of Transp., 142 Wn.App. 510, 178 P.3d 354 (2007) (the individual state agency is the employer, not the State of Washington). "The employee's reciprocal duties include informing the employer of his qualifications, 'applying for all jobs which might fit his abilities,' and 'accepting reasonably compensatory work he could perform.' " Davis v. Microsoft Corp., 149 Wn.2d at 537 (quoting *Dean*).

No published Washington court decision has expressly approved a jury instruction addressing the requirement that the employer and employee communicate in developing a reasonable accommodation, but Washington courts have long held that employers and employees have an obligation to engage in an "interactive process" to develop a reasonable accommodation to allow a disabled employee to continue to perform his or her job. See, e.g., Goodman v. Boeing Co., 127 Wn.2d 401, 408–409, 899 P.2d 1265 (1995) (a reasonable accommodation envisions

an exchange between employer and employee, where each party seeks and shares information to achieve the best match between the employee's capabilities and available positions); Dean v. Mun. of Metro. Seattle, 104 Wn.2d 627, 637–638, 708 P.2d 393 (1985) ("It was correspondingly the duty of [the employee] to cooperate with the employer in the hunt for other suitable work by making the employer aware of his qualifications, by applying for all jobs which might fit his abilities, and by accepting reasonably compensatory work he could perform.") See also Barnett v. U.S. Air, Inc., 228 F.3d 1105, 1116 (9th Cir. 2000) (en banc), vacated on other grounds, 535 U.S. 391, 122 S.Ct. 1516, 152 L.Ed.2d 589 (2002), wherein the court held that "employers, who fail to engage in the interactive process in good faith, face liability for the remedies imposed by the statute if a reasonable accommodation would have been possible." *Barnett* also notes:

> The interactive process requires communication and good-faith exploration of possible accommodations between employers and individual employees. The shared goal is to identify an accommodation that allows the employee to perform the job effectively. Both sides must communicate directly, exchange essential information and neither side can delay or obstruct the process.

Barnett v. U.S. Air, Inc., 228 F.3d at 1114–15. See also Frisino v. Seattle Sch. Dist. No. 1, 160 Wn.App. 765, 781, 249 P.3d 1044 (2011) (addressing the importance of "a good faith *Goodman* interactive process" in developing a reasonable accommodation for a disabled employee).

A requested accommodation to transfer to a different supervisor is considered unreasonable as a matter of law. See Snyder v. Med. Servs. Corp. of E. Wash., 145 Wn.2d 233, 35 P.3d 1158 (2000); see also RCW 49.60.040(7)(d), and the Comment to WPI 330.33 (Disability Discrimination—Reasonable Accommodation—Burden of Proof).

An employer's duty to reasonably accommodate may include modifying or eliminating *non-essential* job functions, or providing a reasonable accommodation to allow the employee to perform essential job functions, such as by providing access to facilities or modifying work schedules. Davis v. Microsoft Corp., 149 Wn.2d 521, 534–35, 70 P.3d 126 (2003); Fey v. State, 174 Wn.App. 435, 452, 300 P.3d 435, 444 (2013). An employer does not have to modify or eliminate essential functions. Frisino v. Seattle Sch. Dist. No. 1, 160 Wn.App. 765, 778, 249 P.3d 1044, 1051 (2011) (citing Pulcino v. Federal Express Corp., 141 Wn.2d 629, 644, 9 P.3d 787 (2000)). See also Harrell v. Dep't of Soc. Health Servs., 170 Wn.App. 386, 398, 285 P.3d 159 (2012).

[Current as of September 2018.]

WPI 330.35

DISABILITY DISCRIMINATION—REASONABLE ACCOMMODATION—EMPLOYER NOTICE AND EMPLOYEE'S DUTY TO COOPERATE

(WITHDRAWN)

COMMENT

The instruction was withdrawn in 2010. This topic is now covered in other instructions in this chapter.

[Current as of September 2018.]

WPI 330.36

DISABILITY DISCRIMINATION—UNDUE HARDSHIP

An employer is not required to accommodate an employee's disability if it would impose an undue hardship on the operation of the employer's business. (Name of defendant) **has the burden of proving that an accommodation would impose an undue hardship on** (name of defendant).

An accommodation is an undue hardship if the cost or difficulty is unreasonable, considering[:]

(1) The size of and the resources available to the employer[;]

[(2) Whether the cost can be included in planned remodeling or maintenance;] [and]

[(3) [The requirements of contracts]].

NOTE ON USE

Under certain circumstances, non-cost factors also may support an undue hardship instruction. This instruction should be modified as necessary under such circumstances.

If the restrictions of other laws or regulations are a part of the employer's argument about undue hardship, the jury should be specifically instructed as to the requirements of the other laws at issue. The instruction likewise will need to be modified to address any "other appropriate considerations" that might apply to a given case.

Use this instruction with WPI 330.34 (Disability Discrimination—Reasonable Accommodation—Definition).

COMMENT

Failure to give this instruction may be error if there is an issue of reasonableness of accommodation or undue hardship. Erwin v. Roundup Corp., 110 Wn.App. 308, 40 P.3d 675 (2002). *Erwin* implicitly approved the former version of this instruction.

Jurors may be confused if the court fails to inform them that the

defendant must prove that a proposed accommodation would be an undue hardship. Easley v. Sea-Land Service, Inc., 99 Wn.App. 459, 471–72, 994 P.2d 271 (2000); Griffith v. Boise Cascade, Inc., 111 Wn.App. 436, 442–43, 45 P.3d 589 (2002) (an accommodation may be an undue burden on the defendant and therefore unreasonable). See also Wheeler v. Catholic Archdiocese of Seattle, 65 Wn.App. 552, 829 P.2d 196 (1992), reversed on other grounds, 124 Wn.2d 634, 880 P.2d 29 (1994).

If the employer has provided an accommodation to an employee, then the correct focus is whether the accommodation was reasonable. The employer is not required to further show that each of the employee's alternative accommodations would result in undue hardship. Sharpe v. Am. Tel. & Tel. Co., 66 F.3d 1045 (9th Cir. 1995).

> [T]he extent of undue hardship on the employer's business is at issue only where the employer claims that it is unable to offer any reasonable accommodation without such hardship.
>
> . . .
>
> [T]o hold otherwise would contravene clear law established by Washington courts that '[the antidiscrimination] Act does not require an employer to offer the employee the precise accommodation he or she requests.'

Sharpe v. Am. Tel. & Tel. Co., 66 F.3d at 1050 (citations omitted). See also Doe v. Boeing Co., 121 Wn.2d 8, 846 P.2d 531, 537 (1993).

[Current as of September 2018.]

WPI 330.37

ESSENTIAL FUNCTION—DEFINITION

An essential function is a job duty that is fundamental, basic, necessary and indispensable to filling a particular position, as opposed to a marginal duty divorced from the essence or substance of the job.

In determining whether a function is essential to a position, you may consider, among others, the following factors:

(1) whether the reasons the position exists include performing that function;

(2) the employer's judgment as to which functions are essential;

(3) the judgment of those who have experience working in and around the position in question;

(4) any written job descriptions such as those used to advertise the position; and

(5) the amount of time spent on the job performing the particular function.

NOTE ON USE

This definition should be used whenever there is an issue as to whether a function of the position is essential. This issue is most likely to arise in accommodation cases. This instruction is designed to be used together with WPI 330.34 (Disability Discrimination—Reasonable Accommodation—Definition). In appropriate cases, also use WPI 330.36 (Disability Discrimination—Undue Hardship) or WPI 330.04 (Employment Discrimination—Bona Fide Occupational Qualification (BFOQ)). See Comment below regarding use of BFOQ instruction in discharge cases.

COMMENT

The two seminal cases discussing the definition of "essential func-

tion" are Davis v. Microsoft Corp., 149 Wn.2d 521, 533, 70 P.3d 126 (2003), and Easley v. Sea-Land Service, Inc., 99 Wn.App. 459, 472, 994 P.2d 271 (2000). The pattern instruction uses language from *Davis* (149 Wn.2d at 533) and the trial court's instruction in *Easley* (99 Wn.App. at 465 n.3). The Court of Appeals in *Easley* approved the instruction. Easley v. Sea-Land Service, Inc., 99 Wn.App. at 465 n.4.

> "The term essential functions means the *fundamental job duties* of the employment position the individual with a disability holds or desires. The term 'essential functions' does not include the *marginal* functions of the position."

Davis v. Microsoft Corp., 149 Wn.2d at 533 (quoting 29 C.F.R. § 630.2(n)(1) (2002)) (emphasis in original). Job presence or attendance may be an essential job function. Davis v. Microsoft Corp., 149 Wn.2d at 534.

The court in Kries v. WA-SPOK Primary Care, LLC, 190 Wn.App. 98, 123–126, 362 P.3d 974 (2015), noted the distinction between "essential functions of a job" and "qualification standards" for a position as articulated in Bates v. United Parcel Serv., Inc., 511 F.3d 974 (9th Cir. 2007) (addressing claims brought under the ADA). Essential functions are basic duties. Qualification standards include personal and professional attributes that may include physical, medical, and safety requirements. In drawing this distinction, the *Bates* court relied on definitions of the terms, under ADA regulations, found respectively in 29 C.F.R. § 1630.2(n)(1) and § 1630.2(q). A qualification standard applies to a person with a disability who applies for a job and meets all selection criteria except one that he or she cannot meet because of a disability.

> Washington law is well settled that to prove a claim for failure to accommodate, a plaintiff must demonstrate that he or she can perform the essential functions of the job as determined and applied by the employer—not that the employer could revamp the essential functions of a job to fit the employee.

Fey v. State, 174 Wn.App. 435, 452, 300 P.3d 435 (2013).

[Current as of September 2018.]

WPI 330.40

DISCRIMINATION BASED ON RELIGION OR CREED—FAILURE TO ACCOMMODATE—DEFINITION

An employer has a duty to provide a reasonable accommodation to an employee if that employee has a need for such an accommodation based upon a bona fide religious belief, practice or observance, unless the accommodation would impose an undue hardship on the employer.

There may be more than one reasonable accommodation for a religious belief, practice or observance. The accommodation need not be the precise accommodation the employee requests, as long as the accommodation provided is effective.

NOTE ON USE

Use this instruction with WPI 330.41 (Discrimination Based on Religion and Creed—Reasonable Accommodation—Burden of Proof) and, when appropriate, WPI 330.42 (Discrimination Based on Religion and Creed—Undue Hardship).

COMMENT

This instruction was first published in the 2017–2018 Supplement to 6A Washington Practice, Washington Pattern Jury Instructions: Civil (6th ed.). In Kumar v. Gate Gourmet, Inc., 180 Wn.2d 481, 325 P.3d 193 (2014), the Washington Supreme Court expressly recognized a cause of action for failing to accommodate an employee's religious practices. The Washington Supreme Court also recognized both a disparate treatment and disparate impact cause of action. Kumar v. Gate Gourmet, Inc., 180 Wn.2d at 498–99. According to the *Kumar* court, the term "creed" in the Washington Law Against Discrimination (WLAD) refers to religious belief. Kumar v. Gate Gourmet, Inc., 180 Wn.2d at 489.

The second paragraph of the instruction states well-established law in Washington with respect to accommodations of disabilities, which the *Kumar* court cited with approval with respect to religious accommodation. Kumar v. Gate Gourmet, Inc., 180 Wn.2d at 501–03.

In contrast to the instruction on disability discrimination and ac-

commodation, this instruction does not list possible forms of reasonable accommodation. *Kumar* is the only Washington case to provide guidance. However, in interpreting the Washington Law Against Discrimination, the *Kumar* court looked at cases applying Title VII's prohibition against religious discrimination.

The EEOC guidance on religious discrimination, 29 CFR § 1605.2, lists specific examples of possible accommodations, including adjustments to work schedules, flexible scheduling of arrival and departure times, breaks and lunch time, voluntary substitutes and "swaps," and lateral transfers. Other potential forms of accommodation identified by the Commission include exceptions to dress and grooming rules, use of the work facility for a religious observance, and accommodating prayer, proselytizing, and other forms of religious expression.

[Current as of September 2018.]

WPI 330.41

DISCRIMINATION BASED ON RELIGION OR CREED—REASONABLE ACCOMMODATION—BURDEN OF PROOF

Discrimination in employment on the basis of religion or creed is prohibited. One form of unlawful discrimination is a failure to reasonably accommodate an employee's bona fide religious belief, practice or observance.

To establish [his] [her] claim of discrimination on the basis of failure to reasonably accommodate a religious belief, practice or observance, (name of plaintiff) has the burden of proving each of the following elements:

(1) That (name of plaintiff) had a bona fide religious belief, the practice or observance of which conflicted with employment duties;

(2) That (name of plaintiff) either informed (name of employer) of the belief, practice or observance and the conflict, or (name of employer) was on notice of the belief, practice or observance and the conflict;

(3) That (name of employer) responded by subjecting [him] [her] to threatened or actual discriminatory treatment.

If you find from your consideration of all of the evidence that each of these propositions has been proved, then your verdict should be for (name of plaintiff) [on this claim]. On the other hand, if any of these propositions have not been proved, your verdict should be for (name of employer) [on this claim].

NOTE ON USE

Use this instruction with WPI 330.40 (Discrimination Based on Religion or Creed—Reasonable Accommodation—Definition) and, when appropriate, WPI 330.42 (Discrimination Based on Religion or Creed—Undue Hardship).

COMMENT

This instruction was first published in the 2017–2018 Supplement to 6A Washington Practice, Washington Pattern Jury Instructions: Civil (6th ed.). The instruction is derived from Kumar v Gate Gourmet, 180 Wn.2d 481, 501–02, 325 P.3d 193, 203 (2014). With respect to the second element, the phrase "or the employer was on notice . . ." is included to incorporate the court's holdings that with respect to disability accommodation, the employee is not required under the Washington Law Against Discrimination to request an accommodation. Rather, the employer's duty is triggered by the employer being on notice of a disability and its accompanying limitations. Riehl v. Foodmaker, Inc., 152 Wn.2d 138, 145, 94 P.3d 930 (2004); Hill v. BTCI Income Fund I, 144 Wn.2d 172, 193, 23 P.3d 440 (2001).

[Current as of September 2018.]

WPI 330.42

DISCRIMINATION BASED ON RELIGION OR CREED—FAILURE TO ACCOMMODATE—DEFENSE AND UNDUE HARDSHIP

(Name of employer) is not obligated to accommodate (name of employee)'s religious [belief/observance/practice] if providing such accommodation would cause undue hardship to (name of employer)'s business.

An accommodation causes an "undue hardship" when it would have more than an insignificant effect on the business.

NOTE ON USE

Use with WPI 330.40 (Religious Discrimination based on Failure to Accommodate—Definition) and WPI 330.41 (Discrimination Based on Religion and Creed—Reasonable Accommodation—Burden of Proof) when appropriate.

COMMENT

This instruction was first published in the 2017–2018 Supplement to 6A Washington Practice, Washington Pattern Jury Instructions: Civil (6th ed.).

In Kumar v. Gate Gourmet, Inc., 180 Wn.2d 481, 325 P.3d 193 (2014), the Supreme Court recognized the claim of failure to accommodate a religious practice, subject to the defense that the employer either offered the employee a reasonable accommodation or that doing so would have caused it an "undue hardship." This defense arises under a 1972 amendment to Title VII expressly articulating the reasonable accommodation rule, which had previously been derived from EEOC regulations. 42 U.S.C. § 2000e(j). The term undue hardship was left undefined.

In 1977, the United States Supreme Court held that an undue hardship results whenever an accommodation requires an employer "to bear more than a *de minimis* cost." Kumar v. Gate Gourmet, Inc., 180 Wn.2d at 502, quoting Trans World Airlines, Inc. v Hardison, 432 U.S. 63, 84, 97 S. Ct. 2264, 53 L.Ed.2d 113 (1977). The *Kumar* court added:

> And other courts have held that an undue hardship may be something other than a financial burden. An employer can defeat a

religious accommodation claim by showing that valid concerns other than money—e.g., legal obligations or the interests of clients or other employees—would be unduly burdened by an accommodation.

Kumar v. Gate Gourmet, Inc., 180 Wn.2d at 502. The WPI Committee advises practitioners to exercise caution when relying upon this last sentence, as it potentially conflicts with the well-established doctrine that deference to a customer's discriminatory preference is itself discriminatory. See, e.g., Tamosaitis v. URS Inc., 781 F.3d 468, 482–83 (9th Cir. 2015).

The last sentence of the instruction is derived from the California civil jury instruction

CACI No. 2561, which relied on Trans World Airlines, Inc. v Hardison, 432 U.S. 63, 84, 97 S.Ct. 2264, 53 L.Ed.2d 113 (1977). The EEOC has promulgated extensive regulations and guidance interpreting and exploring the boundaries of undue hardship and "*de minimis*" cost with respect to religious discrimination. EEOC Compliance Manual, Number 915.003, Section 12-IV (B and C)(2008). Parts of the EEOC discussion regarding undue hardship from its Compliance Manual are included immediately below.

1. Case-by-Case Determination

The determination of whether a particular proposed accommodation imposes an undue hardship must be made by considering the particular factual context of each case. Relevant factors may include the type of workplace, the nature of the employee's duties, the identifiable cost of the accommodation in relation to the size and operating costs of the employer, and the number of employees who will in fact need a particular accommodation. For example, an employer with multiple facilities might be better able than another employer to accommodate a Muslim employee who seeks a transfer to a location with a nearby mosque that he can attend during his lunch break.

To prove undue hardship, the employer will need to demonstrate how much cost or disruption the employee's proposed accommodation would involve. An employer cannot rely on potential or hypothetical hardship when faced with a religious obligation that conflicts with scheduled work, but rather should rely on objective information. A mere assumption that many more people with the same religious practices as the individual being accommodated may also seek accommodation is not evidence of undue hardship. The determination of whether a proposed accommodation would pose an undue hardship is based on concrete, fact-specific considerations.

2. More than *De Minimis* Cost

To establish undue hardship, the employer must demonstrate

that the accommodation would require more than *de minimis* cost. Factors to be considered are the identifiable cost in relation to the size and operating costs of the employer, and the number of individuals who will in fact need a particular accommodation. Generally, the payment of administrative costs necessary for an accommodation, such as costs associated with rearranging schedules and recording substitutions for payroll purposes or infrequent or temporary payment of premium wages (*e.g.*, overtime rates) while a more permanent accommodation is sought, will not constitute more than *de minimis* cost, whereas the regular payment of premium wages or the hiring of additional employees to provide an accommodation will generally cause an undue hardship to the employer. The Commission will presume that the infrequent payment of premium wages for a substitute or the payment of premium wages while a more permanent accommodation is being sought are costs which an employer can be required to bear as a means of providing reasonable accommodation.

Costs to be considered include not only direct monetary costs but also the burden on the conduct of the employer's business. For example, courts have found undue hardship where the accommodation diminishes efficiency in other jobs, infringes on other employees' job rights or benefits, impairs workplace safety, or causes coworkers to carry the accommodated employee's share of potentially hazardous or burdensome work. Whether the proposed accommodation conflicts with another law will also be considered.

EEOC Compliance Manual, Number 915.003, Section 12-IV (B).

See also the Washington State Human Rights Commission *Guide to Religion and Washington State Non-Discrimination Laws*, pages 3–4, updated July 2015.

An employer can refuse to provide a reasonable accommodation if it would pose an undue hardship. Undue hardship may be shown if the accommodation would impose "more than *de minimis* cost" on the operation of the employer's business. The concept of "more than *de minimis* cost" is discussed above in sub-section 2 of the EEOC Compliance Manual. Although the employer's showing of undue hardship under Title VII is easier than under the ADA, the burden of persuasion is still on the employer. If an employee's proposed accommodation would pose an undue hardship, the employer should explore alternative accommodations.

[Current as of September 2018.]

WPI 330.50

WRONGFUL TERMINATION IN VIOLATION OF PUBLIC POLICY

It is unlawful to terminate an employee [for refusing to commit an unlawful act] [for performing a public duty] [for exercising a legal right or privilege] [in retaliation for reporting employer misconduct].

NOTE ON USE

Use this instruction when a plaintiff claims that a public policy was involved in a termination from employment. If the plaintiff's claim does not fall within one of the bracketed scenarios, a different instruction consistent with Gardner v. Loomis Armored, Inc. 128 Wn.2d 931, 941, 913 P.2d 377 (1996) may need to be drafted.

COMMENT

This instruction was first published in the 2017–2018 Supplement to 6A Washington Practice, Washington Pattern Jury Instructions: Civil (6th ed.).

Three decisions of the Washington Supreme Court altered the Washington common law tort of wrongful termination in violation of a public policy: Becker v. Community Health Systems, 184 Wn.2d 252, 359 P.3d 746 (2015), Rose v. Anderson Hay & Grain Co., 184 Wn.2d 268, 358 P.3d 1159 (2015), and Rickman v. Premera Blue Cross, 184 Wn.2d 300, 358 P.3d 1153 (2015). These decisions effectively overruled Cudney v. ALSCO, Inc., 172 Wn.2d 524, 259 P.3d 244 (2011). Because of these cases, the focus of the claim is now on whether the employee is engaging in an activity protected by public policy and not whether there are alternate means of protecting or advancing the public policy at issue.

To support a claim, the termination may be direct, by an employer, or it may be constructive, when the employee believes it necessary to resign. Becker v. Community Health Systems, 184 Wn.2d 252, 257, 359 P.3d 746 (2015). For the latter circumstance, see WPI 330.52 (Wrongful Termination in Violation of Public Policy—Constructive Discharge—Burden of Proof).

Whether a public policy is involved is a question of law to be decided by a court. Hubbard v. Spokane County, 146 Wn.2d 699, 708, 50 P.3d 602 (2002), overruled on other grounds by Rose v. Anderson Hay and Grain Co., 184 Wn.2d 268, 278–286, 358 P.3d 1139 (2015).

[Current as of September 2018.]

WPI 330.51

WRONGFUL TERMINATION IN VIOLATION OF PUBLIC POLICY—BURDEN OF PROOF

To recover on [his] [her] claim of wrongful termination in violation of public policy, (name of plaintiff) **has the burden of proving that a substantial factor motivating the employer to terminate [his] [her] employment was [his] [her] [refusing to commit an unlawful act] [performing a public duty] [exercising a legal right or privilege] [reporting what [he] [she] reasonably believed to be employer misconduct].**

If you find from your consideration of all of the evidence that (name of plaintiff) **has not met this burden, then you must find for the defendant** (name of employer) **[on this claim].**

If you find from your consideration of all of the evidence that (name of plaintiff) **has met this burden, then you must find for plaintiff** (name of plaintiff) **[on this claim].**

NOTE ON USE

Use this instruction when the plaintiff alleges a termination in violation of one of the four categories of wrongful discharge in violation of public policy listed in the first paragraph of the instruction.

This instruction sets out the issues a jury must decide for a claim of wrongful termination in violation of public policy. See Comment below regarding the employer's "overriding justification" defense.

COMMENT

This instruction has been revised for this edition.

This instruction is based on Becker v. Community Health Systems, 184 Wn.2d 252, 359 P.3d 746 (2015), Rose v. Anderson Hay & Grain Co., 184 Wn.2d 268, 358 P.3d 1159 (2015), and Rickman v. Premera Blue Cross, 184 Wn.2d 300, 358 P.3d 1153 (2015). The three decisions effectively overruled Cudney v. ALSCO, Inc., 172 Wn.2d 524, 259 P.3d 244 (2011), which had required a plaintiff to prove that bringing a tort action was strictly necessary to vindicate the public policy at issue. Rickman v. Premera Blue Cross, 184 Wn.2d at 310.

The "substantial factor" test applies to the causation element of a

claim for wrongful termination in violation of public policy. Rickman v. Premera Blue Cross, 184 Wn.2d at 314. See also RCW Chapter 49.60, WPI 330.01 (Employment Discrimination—Disparate Treatment—Burden of Proof), and WPI 330.01.01 (Employment Discrimination—Disparate Treatment—Burden of Proof—Substantial Factor).

To support a claim, the termination may be direct, by an employer, or it may be constructive, when the employee believes it necessary to resign. Korslund v. DynCorp Tri-Cities Services, Inc., 156 Wn.2d 168, 177 n.1, 125 P.3d 119 (2005).

In Gardner v. Loomis Armored, Inc., 128 Wn.2d 931, 936, 913 P.2d 377 (1996), the Court adopted a four-part framework based on a treatise written by Henry Perritt known as "the Perritt framework." It has clarified that "the Perritt framework should not be applied to a claim that falls within one of the four categories of wrongful discharge in violation of a public policy." Martin v. Gonzaga Univ., 191 Wn.2d 712, 723–24, 425 P.3d 837, 843 (2018) (quoting Becker v. Cmty. Health Sys. Inc., 184 Wn.2d 252, 258-59, 359 P.3d 746 (2015)). The four categories are listed in the first paragraph of this jury instruction.

In cases that do not fall within one of the four categories of wrongful discharge listed in the first paragraph of the instruction, and the employee relies on the Perritt framework to establish liability, the employer may assert an "overriding justification defense" to the wrongful discharge claim. In such cases, "[i]f 'the employer has an overriding reason for terminating the employee despite the employee's public-policy-linked conduct,' then it cannot be held liable." Martin v. Gonzaga Univ., 191 Wn.2d at 728 (quoting Gardner v. Loomis Armored, Inc., 128 Wn.2d at 947). "Once a plaintiff presents a prima facie case of wrongful discharge in violation of public policy, the burden of proof shifts to the employer to show the termination was justified by an overriding consideration." Martin v. Gonzaga Univ., 191 Wn.2d at 728 (quoting Rickman v. Premera Blue Cross, 184 Wn.2d at 314). The Supreme Court has not addressed the jury's role in making this determination.

The version of WPI 330.51 published in the 2017–2018 Supplement to 6A Washington Practice, Washington Pattern Jury Instructions: Civil (6th ed.) included the following paragraph:

> [If you find from your consideration of all of the evidence that (name of plaintiff) has met this burden, then you must determine whether (name of employer) has met its burden of proving that it had an overriding justification for terminating (name of plaintiff). If you find that (name of employer) has met its burden of proving it had an overriding justification for its actions, then you must find for (name of employer). If (name of employer) has not met this burden, then you must find for (name of plaintiff) [on this claim].]

In Martin v. Gonzaga University, 200 Wn.App. 332, 402 P.3d 294 (2017), affirmed on other grounds, 191 Wn.2d 712, 425 P.2d 837 (2018), Judge Fearing suggested that the sufficiency of an employer's justification for termination is a question of law for the trial court and not for a jury to decide. Martin v. Gonzaga University, 200 Wn.App. at 369. The Washington Supreme Court has yet to decide that issue.

Until the Supreme Court clarifies this issue, if the trial court determines that the jury should decide whether the employer has met its burden of proving that it had an overriding justification for terminating the plaintiff, an appropriate instruction will need to be drafted.

[Current as of March 2019.]

WPI 330.52

WRONGFUL TERMINATION IN VIOLATION OF PUBLIC POLICY—CONSTRUCTIVE DISCHARGE—BURDEN OF PROOF

Constructive discharge occurs when an employer deliberately creates working conditions so intolerable that a reasonable person in the shoes of the employee would feel compelled to [resign] [retire].

To establish constructive discharge, (name of plaintiff) **must prove the following:**

1. **That the defendant deliberately made working conditions intolerable for [him] [her];**

2. **That a reasonable person in [his] [her] position would be forced to [resign] [retire];**

3. **That [he] [she] [resigned] [retired] because of the conditions and not for any other reason; and**

4. **That [he] [she] suffered damage as a result of being forced to [resign] [retire].**

NOTE ON USE

This instruction sets forth the elements of a claim of constructive discharge and can be used when a plaintiff was not expressly terminated from employment but claims that he or she was forced to resign or retire because the defendant/employer made working conditions intolerable. This instruction may be used in any claim asserting a wrongful termination through constructive discharge; but see the Comment below regarding Martini v. Boeing, 137 Wn.2d 357, 367, 971 P.2d 45 (1999), in which the Supreme Court held that a plaintiff alleging disability discrimination under the Washington Law Against Discrimination (WLAD) is not required to establish constructive discharge to recover lost wages.

COMMENT

This instruction was first published in the 2017–2018 Supplement

to 6A Washington Practice, Washington Pattern Jury Instructions: Civil (6th ed.).

The Court of Appeals approved this instruction, with minor rewording, in Barnett v. Sequim Valley Ranch, LLC, 174 Wn.App. 475, 489, 302 P.3d 500, 507 (2013), stating "[N]umerous Washington cases establish that these four elements are necessary for a wrongful constructive discharge claim." See, e.g., Haubry v. Snow, 106 Wn.App. 666, 31 P.3d 1186 (2001), in which the court explained that an employee:

> must prove that [her employer] deliberately made working conditions intolerable for her; that a "reasonable person in her position" would be forced to quit; that she did quit because of the conditions and not for any other reason; and that she suffered damage as a result of being forced to quit . . .

Haubry v. Snow, 106 Wn.App. at 677 (quoting Hill v. GTE Directories Sales Corp., 71 Wn.App. 132, 143, 856 P.2d 746 (1993)). See also Sneed v. Barna, 80 Wn.App. 843, 849, 912 P.2d 1035 (1996) (to establish constructive discharge, the employer must engage in a deliberate act that made working conditions so intolerable that a reasonable person would have felt compelled to resign).

Whether conditions are intolerable is a question of fact. Bulaich v. AT & T Info. Sys., 113 Wn.2d 254, 261–62, 778 P.2d 1031 (1989). The "intolerable" element can be shown by aggravated circumstances or a pattern of conduct. Sneed v. Barna, 80 Wn.App. at 850 (citing Wunderly v. S.C. Johnson & Son, Inc., 828 F.Supp. 801, 806 (D. Or. 1993)). Additionally, the employee must show that he or she resigned because of the conditions and not for some other reason, like finding a better job. Glasgow v. Georgia-Pacific Corp., 103 Wn.2d 401, 408, 693 P.2d 708 (1985) (citing Henson v. City of Dundee, 682 F.2d 897, 907 (11th Cir. 1982)).

The question of whether an employee must prove that the employer deliberately intended to force the employee to resign, as opposed to deliberately intending to create an intolerable working atmosphere which had the effect of causing the employee's resignation, is unresolved. See discussion in Bulaich v. AT & T Info. Sys., 113 Wn.2d at 261–62. The *Bulaich* court noted a conflict among jurisdictions as to whether the employee must prove an employer's subjective intent to provoke the employee's resignation, but expressly declined to resolve that conflict.

In Martini v. Boeing, 137 Wn.2d 357, 367, 971 P.2d 45 (1999), the Supreme Court held that an employee who resigned because of a failure to accommodate a disability was not required to prove constructive discharge before being entitled to damages under RCW 49.60.030(2). A plaintiff bringing a claim under RCW Chapter 49.60 need only establish that the damages were proximately caused by the discrimination. Martini v. Boeing, 137 Wn.2d at 368.

[Current as of September 2018.]

WPI 330.81

DAMAGES—ECONOMIC AND NON-ECONOMIC—NO AFTER-ACQUIRED EVIDENCE

It is the duty of the court to instruct you as to the measure of damages. By instructing you on damages, the court does not mean to suggest for which party your verdict should be rendered.

If your verdict is for (name of employee) **, you must determine the amount of money that will reasonably and fairly compensate** (name of employee) **for such damages as you find were proximately caused by the acts of** (name of employer(s)).

If you find for (name of employee), **[your verdict shall include the following undisputed items:**

(here insert undisputed items and amounts)

In addition] you should consider the following elements:

[(1)] [The reasonable value of lost past earnings and fringe benefits, from the date ofthe wrongful conductto the date of trial;]

[(2)] [The reasonable value of lost future earnings and fringe benefits;]

[(3)] [The physical harm to (name of employee)**;] [and]**

[(4)] [The emotional harm to (name of employee) **caused by [**(name of employer)'s**] [**(name of employers')**]wrongful conduct, including [emotional distress] [loss of enjoyment of life] [humiliation] [pain and suffering] [personal indignity, embarrassment], [fear, anxiety, and/or anguish] experienced and with reasonable probability to be experienced by** (name of employee) **in the future.]**

The burden of proving damages rests with the party claiming them, and it is for you to determine, based upon the evidence, whether any particular element has been proved by a preponderance of the evidence.

Any award of damages must be based upon evidence and not upon speculation, guess, or conjecture. The law has not furnished us with any fixed standards by which to measure [emotional distress] [loss of enjoyment of life] [humiliation] [pain and suffering] [personal indignity, embarrassment][fear, anxiety, and/or anguish]. With reference to these matters, you must be governed by your own judgment, by the evidence in the case, and by these instructions.

NOTE ON USE

Do not use if WPI 330.81.01 (Damages—Economic and Non-Economic—After-Acquired Evidence) is being used.

Use the first bracketed phrase when there are undisputed items of damages.

Use the bracketed paragraphs regarding elements of compensatory damages for which there is an evidentiary basis in the case. Do not use the numbers in the instruction; they are set out for discussion purposes. The numbered paragraphs include the most common elements of damages in employment discrimination cases. For guidance as to other damage issues, see WPI 30.05 (Measure of Damages—Elements of Noneconomic Damages—Disability, Disfigurement, and Loss of Enjoyment of Life) through WPI 30.09.02 (Measure of Economic Damages—Elements of Future Damages—Domestic Services/Nonmedical Expenses).

If there is a claim for wage loss, use the instruction with WPI 330.83 (Damages—Mitigation—Wage Loss). If there is an issue regarding the amount of damages for emotional distress attributable to the defendant, it may also be appropriate to give a version of WPI 30.17 (Aggravation of Pre-Existing Condition) or WPI 30.18 (Previous Infirm Condition), and/or WPI 33.02 (Avoidable Consequences—Failure to Secure Treatment).

When there is a claim for future lost wages, using paragraph (2), use this instruction with WPI 330.82 (Damages—Employment Discrimination—Future Lost Earnings (Front Pay)). Practitioners should note that there are offsets against economic damages, including earned

income and failure to mitigate. See WPI 330.83 (Damages—Mitigation—Wage Loss), and/or WPI 33.03 (Avoidable Consequences—Property or Business), or WPI 303.06 (Contract—Mitigation of Damages) for instructions on mitigation.

For a definition of proximate cause, use WPI 15.01 (Proximate Cause—Definition), or WPI 15.01.01 (Proximate Cause—Definition—Alternative).

COMMENT

This instruction is based upon RCW Chapter 49.60, WPI 30.01.01 (Measure of Economic and Noneconomic Damages—Personal Injury—No Contributory Negligence), and numerous cases more specifically analyzing damage issues.

As in a typical personal injury case, the burden of proving damages rests with the plaintiff. In employment cases, plaintiffs are entitled to recover for personal injuries for emotional distress, humiliation, and pain and suffering. Cagle v. Burns and Roe, Inc., 106 Wn.2d 911, 726 P.2d434 (1986); Dean v. Municipality of Metropolitan Seattle-Metro, 104 Wn.2d 627, 708 P.2d 393 (1985). Plaintiffs must also prove economic damages.

A plaintiff may recover damages for emotional distress so long as he or she presents evidence sufficient to support a damages award. Bunch v. King County Dep't of Youth Servs., 155 Wn.2d 165, 116 P.3d 381 (2005). Plaintiff must produce "evidence of anguish and distress." Bunch v. King County Dep't of Youth Servs., 155 Wn.2d at 181. The plaintiff need only produce "sufficient evidence to convince an 'unprejudiced, thinking mind' of his anguish." Bunch v. King County Dep't of Youth Servs., 155 Wn.2d at 181. Such evidence can be provided by the plaintiff's own testimony; evidence from a health care professional is not required to prove emotional distress. Bunch v. King County Dep't of Youth Servs., 55 Wn.2d at 181. Corroboration is helpful, but the jury is the ultimate decision maker. Bunch v. King County Dep't of Youth Servs., 155 Wn.2d at 181.

In some cases a plaintiff may recover damages for injuries sustained outside the limitations period. Adopting the reasoning in National R.R. Passenger Corp. v. Morgan, 536 U.S. 101, 122 S. Ct. 2061, 153 L. Ed. 2d 106 (2002), the Washington Supreme Courtheld that in a hostile work claim, an employer may be liable for acts of harassment which occurred outside the three-year statute of limitations so long as one or more acts of harassment occurred within the limitations period. Antonius v. King County, 153 Wn.2d 256, 258–59, 103 P.3d 729 (2005). It is the court's responsibility to determine whether acts "are part of the same actionable hostile work environment." Antonius v. King County, 153 Wn.2d at 271.

Under RCW Chapter 49.60, damages might be taxable income to the plaintiff. A plaintiff may recover an offset for the federal income tax consequences of a damages award under RCW 49.60.030(2). Blaney v. Int'l Ass'n of Machinists & Aerospace Workers, Dist. No. 160, 151 Wn.2d 203, 217–18, 87 P.3d 757 (2004) (the offset is recoverable under RCW 49.60.030(2)'s "other appropriate remedy" language rather than as actual damages).

Disability benefits are not offset against wage loss if the disability benefits are a fringe benefit. Xieng v. Peoples Nat. Bank of Washington, 120 Wn.2d 512, 844 P.2d 389 (1993). Disability benefits may be an offset against past and future wage loss when used as an indemnification by the employer against future liability. Xieng v. Peoples Nat. Bank of Washington, 120 Wn.2d at 525–26.

Unemployment compensation and workers' compensationbenefits are not an offset against an award of damages for economic loss, because they come from a collateral source. Hayes v. Trulock, 51 Wn.App. 795, 803–04, 755 P.2d 830 (1988); Johnson v. WeyerhaeuserCo.,134 Wn.2d 795, 799–800, 953 P.2d 800 (1998).

An employer's immunity under RCW Title 51, the workers' compensation statutes, does not preclude a claim for damages under RCW Chapter 49.60 for physical injuries and emotional harm. Goodman v. Boeing Co., 127 Wn.2d 401, 899 P.2d 1265 (1995). There may be offsets of or subrogation to workers' compensation benefits. See Goodman v. Boeing Co., 127 Wn.2d 401 and Reese v. Sears Roebuck & Co., 107 Wn.2d 563, 731 P.2d 497 (1987), overruled on other grounds byPhillips v. City of Seattle, 111 Wn.2d 903, 766 P.2d 1099 (1989).

An employee who successfully proves a violation of RCW 49.60.180(3) has a claim for damages under this statute. The employee is not required to prove a separate claim that he or she was discharged or constructively discharged in order to seek damages for front and back pay. Martini v. Boeing Co., 137 Wn.2d 357, 363–64, 367–69, 370–72, 971 P.2d 45 (1999); RCW 49.60.030(2).

[Current as of September 2018.]

WPI 330.81.01

DAMAGES—ECONOMIC AND NON-ECONOMIC—AFTER-ACQUIRED EVIDENCE

It is the duty of the court to instruct you as to the measure of damages. By instructing you on damages, the court does not mean to suggest for which party your verdict should be rendered.

If your verdict is for (name of employee), **you must determine the amount of money that will reasonably and fairly compensate** (name of employee) **for such damages as you find were proximately caused by the acts of** (name of employer).

If you find for (name of employee), **[your verdict shall include the following undisputed items:**

(here insert undisputed items and amounts)

In addition,] you should consider the following elements:

[(1)] [The reasonable value of lost past earnings and fringe benefits, from the date of the wrongful conduct to the date of trial;]

[(2)] [The reasonable value of lost future earnings and fringe benefits;]

[(3)] [The physical harm to (name of employee)**;] [and]**

[(4)] [The emotional harm to (name of employee) **caused by** (name of employer's) **wrongful conduct, including [emotional distress] [loss of enjoyment of life] [humiliation] [pain and suffering] [personal indignity, embarrassment][fear, anxiety, and/or anguish] experienced and with reasonable probability to be experienced by** (name of employee) **in the future.]**

[If you find that (name of employer) has proved its after-acquired evidence defense, you must calculate lost past earnings and fringe benefits from the date of termination to the date that additional evidence was discovered, and you may not award lost future earnings and fringe benefits.]

The burden of proving damages rests with the party claiming them, and it is for you to determine, based upon the evidence, whether any particular element has been proved by a preponderance of the evidence.

Any award of damages must be based upon evidence and not upon speculation, guess, or conjecture. The law has not furnished us with any fixed standards by which to measure [emotional distress] [loss of enjoyment of life] [humiliation] [pain and suffering] [personal indignity, embarrassment] [fear, anxiety, and/or anguish]. With reference to these matters, you must be governed by your own judgment, by the evidence in the case, and by these instructions.

NOTE ON USE

Use this instruction instead of WPI 330.81 (Damages—Economic and Non-Economic—No After-Acquired Evidence) in a wrongful termination case if there is evidence that (1) the employer discovered additional information after terminating the employee that was sufficient to support a lawful discharge and (2) the employer would have terminated the employee after discovering the information.

Use with WPI 330.81.02 (Damages—After-Acquired Evidence).

COMMENT

This instruction wasfirst published inthe 2017–2018 Supplement to 6A Washington Practice, Washington Pattern Jury Instructions: Civil (6th ed.).

The U.S. Supreme Court's opinion in McKennon v. Nashville Banner Publ'g Co., 513 U.S. 352, 360–63, 115 S.Ct. 879, 130 L.Ed. 2d 852 (1995), contains an extended discussion of the equitable basis for the after-acquired evidence doctrine.

The Washington Court of Appeals, Division Three, adopted the doc-

trine as set forth in *McKennon* in Janson v. N. Valley Hosp., 93 Wn.App. 892, 971 P.2d 67 (1999). Division One followed suit in Goehle v. Fred Hutchinson Cancer Ctr., 100 Wn.App. 609, 1 P.3d 579 (2000), holding that after-acquired evidence could be admitted as relevant to the employee's credibility even if not used to limit damages.

In Lodis v. Corbis Holdings, Inc., 192 Wn.App. 30, 366 P.3d 1246 (2015), review denied 185 Wn.2d 1038 (2016) ("Lodis II"), the Court of Appeals erased any doubt as to the doctrine's viability:

> "The 'after-acquired evidence' doctrine precludes or limits an employee from receiving remedies for wrongful discharge if the employer later 'discovers' evidence of wrongdoing that would have led to the employee's termination had the employer known of the misconduct." An employer can avoid back pay and other remedies by coming forward with after-acquired evidence of an employee's misconduct, but only if it can prove by a preponderance of the evidence "that *the wrongdoingwas of such severity* that the employee in fact would have been terminated on those grounds alone if the employer had known of it at the time of the discharge."

Lodis v. Corbis Holdings, Inc., 192 Wn.App. at 60 (emphasis in original).

[Current as of September 2018.]

WPI 330.81.02

DAMAGES—AFTER-ACQUIRED EVIDENCE

(Name of employer)contends that even if (name of employee) had not been terminated on [date], [he] [she] would have been terminated based on the additional evidence (name of employer) discovered [at a later date] [during its investigation into his/her complaint of wrongful termination] [during the course of this lawsuit]. If (name of employer) proves by a preponderance of the evidence that it would have terminated (name of employee) based on this additional evidence, you must calculate any award of lost past earnings from the date of termination to the dateadditional evidence was discovered and you may not award any lost future earnings.

NOTE ON USE

Use this instruction in a wrongful termination case if there is evidence that (1) the employer discovered additional information after terminating the employee that was sufficient to support a lawful termination and (2) the employer would have terminated the employee after discovering the information.

Use with WPI 330.81.01 (Damages—Economic and Non-Economic—After-Acquired Evidence) if it has been raised as an affirmative defense.

Use bracketed material as applicable. Insert names of parties where appropriate.

COMMENT

This instruction wasfirst published inthe 2017–2018 Supplement to 6A Washington Practice, Washington Pattern Jury Instructions: Civil (6th ed.).

In Lodis v. Corbis Holdings, Inc., 192 Wn.App. 30, 366 P.3d 1246 (2015), review denied 185 Wn.2d 1038 (2016) ("Lodis II"), the Court of Appeals stated:

> "The 'after-acquired evidence' doctrine precludes or limits an employee from receiving remedies for wrongful discharge if the employer later 'discovers' evidence of wrongdoing that would have

> led to the employee's termination had the employer known of the misconduct." An employer can avoid back pay and other remedies by coming forward with after-acquired evidence of an employee's misconduct, but only if it can prove by a preponderance of the evidence "that *the wrongdoing was of such severity* that the employee in fact would have been terminated on those grounds alone if the employer had known of it at the time of the discharge."

Lodis v. Corbis Holdings, Inc., 192 Wn.App. at 60 (emphasis in original). See also Goehle v. Fred Hutchinson Cancer Ctr., 100 Wn.App. 609, 1 P.3d 579 (2000); Janson v. N. Valley Hosp., 93 Wn.App. 892, 971 P.2d 67 (1999).

[Current as of September 2018.]

WPI 330.82

DAMAGES—EMPLOYMENT DISCRIMINATION—FUTURE LOST EARNINGS (FRONT PAY)

In calculating damages for future wage loss [front pay],you should determine the present cash value of salary, pension, and other fringe benefits from today until the time the plaintiff may reasonably be expected to [retire] [fully recover from the continuing effects of the discrimination], decreased by any projected future earnings [from another employer].

NOTE ON USE

Use this instruction when the plaintiff requests front pay as an element of damages, together with paragraph (2) of WPI 330.81 (Damages—Economic and Non-Economic—No After-Acquired Evidence).

Use of the term "retire" may not be appropriate in all cases. This instruction may have to be modified if there is proof in the case that the business was or will be sold.

As appropriate, combine this instruction with applicable portions of WPI 34.02 (Damages Arising in the Future—Discount to Present Cash Value).

COMMENT

Front pay and reinstatement are generally viewed as alternative remedies. Front pay is a jury issue under Washington law. The issue of reinstatement is more complex.It is an equitable remedy for decision by the court. It will be necessary to evaluate the appropriateness of a front pay instruction in a case in which potential reinstatement is an issue. Goodman v. Boeing Co., 75 Wn.App. 60, 78–79, 877 P.2d 703 (1994), affirmed, 127 Wn.2d 401, 899 P.2d 1265 (1995), and Wheeler v. Catholic Archdiocese of Seattle, 65 Wn.App. 552, 573, 829 P.2d 196 (1992), reversed on other grounds, 124 Wn.2d 634, 880 P.2d 29 (1994).

"Front pay should be awarded 'for a reasonably certain period of time that does not exceed the likely duration of the terminated employment.' " Lords v. N. Auto. Corp., 75 Wn.App. 589, 605, 881 P.2d 256 (1994), overruled on other grounds in Mackay v. Acorn Custom Cabinetry, Inc., 127 Wn.2d 302, 898 P.2d 284 (1995) (quoting Hayes v. Trulock, 51 Wn.App. 795, 802, 755 P.2d 830 (1988)).

In an age discrimination case, unless the employer provides evidence to the contrary, a jury may be told to consider that an illegally-discharged employee would have continued working for the employer until he or she reached the normal age of retirement. See Lords v. N. Auto. Corp., 75 Wn.App. at 605. In other cases, the determination of future lost earnings, including the number of years, is generally left to the jury to determine, once an employee produces evidence from which a reasonable future employment period may be projected. See also Blaney v. Int'l Ass'n of Machinists & Aerospace Workers, Dist. No. 160, 151 Wn.2d 203, 210–11, 87 P.3d 757 (2004) (front pay instruction to calculate future damages from today until the time plaintiff may reasonably be expected to retire was improper because duration of future employment may not extend to retirement).

In *Goodman,* an award of damages had included subrogating the employer to the plaintiff's future workers' compensation benefits. Goodman v. Boeing Co., 75 Wn.App. 60, 87–88, 877 P.2d 703 (1994), affirmed, 127 Wn.2d 401, 899 P.2d 1265 (1995).

[Current as of September 2018.]

WPI 330.83

DAMAGES—MITIGATION—WAGE LOSS

The plaintiff, (name of plaintiff), has a duty to use reasonable efforts to mitigate damages. To mitigate means to avoid or reduce damages.

To establish a failure to mitigate, defendant, (name of defendant), has the burden of proving:

(1) There were openings in comparable positions available for (name of plaintiff) elsewhere after (name of defendant) [terminated] [refused to hire] [him] [her];

(2) (Name of plaintiff) failed to use reasonable care and diligence in seeking those openings; and

(3) The amount by which damages would have been reduced if (name of plaintiff) had used reasonable care and diligence in seeking those openings.

You should take into account the characteristics of (name of plaintiff) and the job market in evaluating the reasonableness of (name of plaintiff's) efforts to mitigate damages.

If you find that (name of defendant) has proved all of the above, you should reduce your award of damages for wage loss accordingly.

NOTE ON USE

This instruction is to be used when the plaintiff challenges as discriminatory a discrete employment decision, such as a termination or a failure to hire. When mitigation of damages other than for wage loss is at issue, see WPI 33.02 (Avoidable Consequences—Failure to Secure Treatment).

Whether a mitigation instruction is used will typically depend on whether the employer has pleaded and offered proof on the defense.

COMMENT

This instruction is adapted from Burnside v. Simpson Paper Co., 66

Wn.App. 510, 529, 832 P.2d 537 (1992), affirmed 123 Wn.2d 93, 864 P.2d 937 (1994), overruled on other grounds in Mackay v. Acorn Custom Cabinetry, Inc., 127 Wn.2d 302, 898 P.2d 284 (1995); see also Henningsen v. Worldcom, Inc., 102 Wn.App. 828, 846, 9 P.3d 948 (2000); Kloss v. Honeywell, Inc., 77 Wn.App. 294, 301–02, 890 P.2d 480 (1995). Washington cases have not defined "comparable position."

"Failure to mitigate damages is an affirmative defense under CR 8(c)." Bernsen v. Big Bend Elec. Co-op., Inc., 68 Wn.App. 427, 433, 842 P.2d 1047 (1993); see also, Federal Signal Corp. v.Safety Factors, Inc., 125 Wn.2d 413, 438, 886 P.2d 172 (1994); Burnside v. Simpson Paper Co., 66 Wn.App. at 529.

Mitigation focuses on the reasonableness of the employee's conduct after the alleged discrimination has occurred. See Cobb v. Snohomish County, 86 Wn.App. 223, 232, 935 P.2d 1384 (1997) ("The doctrine of avoidable consequences [i.e., the duty to mitigate] applies only to damages for harm the plaintiff could have avoided after the tort was committed."); Bernsen v. Big Bend Elec. Coop., 68 Wn.App. at 433.

"Success [at mitigation] is not required, nor is the failure to earn a substantial income dispositive of the question of whether a[n] . . . employee exercised reasonable diligence." Burnside v. Simpson Paper Co., 66 Wn.App. at 530. See also Sutton v. Shufelberger, 31 Wn.App. 579, 581, 643 P.2d 920 (1982) (because the duty to mitigate only requires one to take reasonable steps, it is error to instruct jury the duty requires one to obtain another job).

[Current as of September 2018.]

WPI 330.90

EMPLOYEE VERSUS INDEPENDENT CONTRACTOR (MINIMUM WAGE ACT)

You must decide whether (name of plaintiff) **was an employee of or an independent contractor of** (name of defendant). **This decision requires you to determine whether, as a matter of economic reality,** (name of plaintiff) **is economically dependent upon** (name of defendant) **or is instead in business for [himself/herself].**

In deciding economic dependence, you should consider all of the evidence bearing on the question, including the following factors:

(1) Right to control, and degree of control exercised by (name of defendant) **over** (name of plaintiff)**;**

(2) the extent of the relative investments of (name of plaintiff) **and** (name of defendant)**;**

(3) the degree to which (name of plaintiff)**'s opportunity for profit or loss is determined by** (name of defendant)**;**

(4) the skill and initiative required in performing the job;

(5) the degree of permanence of the working relationship; and

(6) whether the service rendered is an integral part of (name of defendant)**'s business.**

This list of factors is nonexclusive, and no single factor should control your decision.

NOTE ON USE

Use this instruction where the employer asserts that the plaintiff was an independent contractor for purposes of Washington's Minimum Wage Act.

This instruction should be used with an instruction setting forth the elements of the Minimum Wage Act claim being asserted.

COMMENT

This instruction wasfirst published inthe 2017–2018 Supplement to 6A Washington Practice, Washington Pattern Jury Instructions: Civil (6th ed.).

The court's opinion in Anfinson v. FedEx Ground Package Sys., Inc., 174 Wn.2d 851, 869–71, 281 P.3d 289 (2012), contains an extensive discussion about the proper interpretation of "employee" under the Minimum Wage Act. In *Anfinson*, the court noted that "[f]ederal courts have established competing lists of nonexclusive factors that are relevant to the determination . . . ." Anfinson v. FedEx Ground Package Sys., Inc., 174 Wn.2d at 869 (citing Hopkins v. Cornerstone Am., 545 F.3d 338, 343 (5th Cir. 2008) and Real v. Driscoll Strawberry Assocs., Inc., 603 F.2d 748, 754 (9th Cir. 1979)). The six factors in the instruction above are taken from these cases.

[Current as of September 2018.]

WPI 330.91

JOINT EMPLOYER STATUS (MINIMUM WAGE ACT)

You must determine whether, as a matter of economic reality, (name of alleged employer) **was a joint employer of** (name of alleged employee).

In determining whether (name of alleged employer) **was** (name of alleged employee)**'s joint employer, you should consider the following factors:**

(1) **the nature and degree of control of the workers by** (name of alleged employer)**;**

(2) **the degree of supervision, direct or indirect, of the work by** (name of alleged employer)**;**

(3) (name of alleged employer)**'s power to determine the pay rates or the methods of payment of the workers;**

(4) (name of alleged employer)**'s right, directly or indirectly, to hire, fire, or modify the employment conditions of the workers;**

(5) (name of alleged employer)**'s preparation of payroll and the payment of wages;**

(6) **whether the work was similar to that of a specialty job in a production line [such as one small step in a sequence of steps];**

(7) **whether responsibility under the contracts between a labor contractor and** (name of alleged employer) **pass from one labor contractor to another without material changes;**

(8) **whether the premises and equipment of** (name of alleged employer) **are used for the work;**

(9) **whether** (name of alleged employee) **belonged to a busi-**

ness organization that could or did shift as a unit from one worksite to another;

(10) whether the work was "piecework" and not work that required initiative, judgment, or foresight;

(11) whether (name of alleged employee) **had an opportunity for profit or loss depending on [his] [her] managerial skill;**

(12) whether there was permanence in the working relationship; and

(13) whether the service rendered is an integral part of (name of alleged employer)**'s business.**

This list of factors is nonexclusive, and no single factor should control your decision. You should evaluate all the circumstances and you should give each factor whatever weight you deem appropriate. How the parties characterize their relationship is not determinative.

NOTE ON USE

Use this instruction when a party claims that another party was a joint employer under the Minimum Wage Act (MWA) and there is evidence to allow the jury to find joint-employer status. This instruction should be used with an instruction setting forth the elements of the Minimum Wage Act claim being asserted.

When there are multiple alleged joint employers, repeat the first paragraph of this section as necessary.

Insert the names of the parties where appropriate, especially when there are multiple alleged joint employers.

COMMENT

This instruction wasfirst published inthe 2017–2018 Supplement to 6A Washington Practice, Washington Pattern Jury Instructions: Civil (6th ed.).

In Becerra v. Expert Janitorial, LLC, 181 Wn.2d 186, 195–97, 332

P.3d 415 (2014), the Washington Supreme Court adopted the 13-factor economic-reality test articulated in Torres-Lopez v. May, 111 F.3d 633, 639–45 (9th Cir. 1997), and explained that additional factors are appropriate if supported by the evidence. For example, the *Becerra* court stated:

> Here, our Court of Appeals properly found that these factors may include whether the putative joint employer knew of the wage and hour violation, whether it paid sufficient amounts to the subcontractors to allow for a lawful wage, and whether the subcontracting arrangement is a " 'subterfuge or sham.' "

Becerra v. Expert Janitorial, LLC, 181 Wn.2d at 198 (quoting Becerra v. Expert Janitorial, LLC, 176 Wn.App. 694, 719, 309 P.3d 711 (2011)).

Erroneously, the trial court in *Becerra* limited consideration to the first five factors based on its belief that factors six through eleven, the "*Rutherford* factors," Rutherford Food Corp. v. McComb, 331 U.S. 722, 67 S.Ct. 1473, 91 L.Ed. 1772 (1947), were not applicable outside a production line work setting such as the meat packing line at issue in *Rutherford*. In reversing that limitation, the Court of Appeals noted that because the work force is shifting away from a production line economy:

> [i]f our courts were to limit their full examinations of potential joint employment relationships to "production line" jobs, employers in the fastest growing sectors of our economy would be insulated from complying with the requirements of the MWA [Minimum Wage Act] and FLSA [Fair Labor Standards Act]. This runs counter to the remedial purposes of both acts.

Becerra v. Expert Janitorial, LLC, 176 Wn.App. 694, 712–13, 309 P.3d 711, 719 (2013), affirmed, 181 Wn.2d 186, 332 P.3d 415 (2014).

[Current as of September 2018.]

PART XVII

CIVIL RIGHTS

CHAPTER 340 CIVIL RIGHTS—GENERAL INTRODUCTORY INSTRUCTIONS

CHAPTER 341 CIVIL RIGHTS—MUNICIPAL AND LOCAL GOVERNMENT LIABILITY

CHAPTER 342 CIVIL RIGHTS—FOURTH AMENDMENT—UNREASONABLE SEARCH AND SEIZURE

CHAPTER 343 CIVIL RIGHTS—CONDITIONS OF CONFINEMENT

CHAPTER 348 CIVIL RIGHTS—DAMAGES AND VERDICT FORMS

CHAPTER 340

CIVIL RIGHTS—GENERAL INTRODUCTORY INSTRUCTIONS

WPI 340.00 Civil Rights—Introduction

WPI 340.01 Claims Instruction for Section 1983 Cases

WPI 340.02 Civil Rights—Individual Defendant—Burden of Proof on the Issues

WPI 340.03 Civil Rights—"Under Color of Law"—Definition

WPI 340.04 Civil Rights—"Subjects" and "Causes to Be Subjected"—Definition

WPI 340.05 Civil Rights—Failure to Train or Inadequate Training—Municipal Liability—"Deliberate Indifference"—Definition

WPI 340.06 Civil Rights—Causation—Comment Only

WPI 340.00

CIVIL RIGHTS—INTRODUCTION

Federal pattern instructions. The United States Court of Appeals for the Ninth Circuit, along with other federal appellate courts, has published jury instructions for use in Section 1983 Civil Rights Act cases. See, e.g., Ninth Cir. Civ. Jury Instructions, Chapter 9, which can be found at http://www3.ce9.uscourts.gov/model-civil. Because federal law largely governs civil rights cases under Section 1983, federal court of appeals instructions are appropriate to use as guides for crafting state court instructions. However, state trial courts must use caution when borrowing language from a federal pattern instruction—federal judges are not prohibited from making a comment on the evidence, while state trial courts are forbidden from doing so under the Washington State Constitution, article IV, section 16.

Federal law claims. The pattern instructions in this Part XVII are written for claims under federal law. They do not necessarily apply to counterpart claims under state law.

Section 1983. The Reconstruction Era Civil Rights Act, codified at 42 U.S.C.A. section 1983, was passed by Congress in 1871 to provide a remedy to those prevented by individuals from exercising their civil rights. See Edgar v. State, 92 Wn.2d 217, 595 P.2d 534 (1979). Section 1983, Title 42 U.S.C.A. provides a remedy "against all forms of official violation of federally protected rights." Monell v. Dep't of Soc. Servs., 436 U.S. 658, 700–01, 98 S.Ct. 2018, 2040–41, 56 L.Ed.2d 611 (1978). It reads in pertinent part as follows:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress . . .

If the rights are protected by federal statute, rather than the federal constitution, the court determines whether the particular federal statutory rights are enforceable under Section 1983. See, e.g., Suter v. Artist M., 503 U.S. 347, 112 S.Ct. 1360, 118 L.Ed.2d 1 (1992); Golden State Transit Corp. v. City of Los Angeles, 493 U.S. 103, 110 S.Ct. 444, 107 L.Ed.2d 420 (1989).

Section 1983 covers federal statutory rights unless (1) the federal statute involved does not create enforceable rights, privileges, or im-

munities, or (2) Congress has expressly foreclosed private enforcement within the terms of the statute itself. See Wilder v. Virginia Hospital Ass'n, 496 U.S. 498, 508, 110 S.Ct. 2510, 110 L.Ed.2d 455 (1990). *Wilder* set forth a three-part test for determining whether a federal statute created enforceable rights:

(1) Was the provision in question intended to benefit the plaintiffs?

(2) Does the statutory provision in question create binding obligations on the state, rather than merely expressing a congressional preference?

(3) Is the interest plaintiffs assert specific enough to be enforced judicially, rather than being vague and amorphous?

See Wash. St. Coalition for the Homeless v. DSHS, 133 Wn.2d 894, 928, 949 P.2d 1291 (1997).

A cause of action under Section 1983 requires proof that the defendant acted under color of state law and that the defendant deprived the plaintiff of a right protected by the federal constitution or federal statute. Sintra, Inc. v. City of Seattle, 119 Wn.2d 1, 829 P.2d 765 (1992); Torrey v. City of Tukwila, 76 Wn.App. 32, 37, 882 P.2d 799 (1994). "State" law may include the ordinances and policies of creatures of the state such as counties or municipalities. See, e.g., R/L Associates, Inc. v. City of Seattle, 113 Wn.2d 402, 780 P.2d 838 (1989).

Federal action is not actionable under Section 1983. Daly-Murphy v. Winston, 837 F.2d 348, 355 (9th Cir. 1987). However, a federal agent or private individual may be subject to Section 1983 if the agent's or private person's actions constitute joint participation, are entwined with state action, or otherwise amount to state action. Brentwood Acad. v. Tenn. Secondary Sch. Athletic Ass'n, 531 U.S. 288, 295–96, 121 S.Ct. 924, 148 L.Ed.2d 807 (2001); Lugar v. Edmondson Oil Co., 457 U.S. 922, 941–42, 102 S.Ct. 2744, 73 L.Ed.2d 482 (1982); see also Knights of Ku Klux Klan, Realm of Louisiana v. East Baton Rouge Parish Sch. Bd., 735 F.2d 895, 900–01 (5th Cir. 1984) (holding that federal officials could be sued under Section 1983 for pressuring the school board to prohibit Klan members from meeting at a school).

State court jurisdiction. State courts have concurrent jurisdiction with federal courts over Section 1983 claims. Haywood v. Drown, 556 U.S. 729, 731, 129 S.Ct. 2108, 173 L.Ed.2d 920 (2009). State courts may not refuse to entertain Section 1983 suits because they believe federal law is inconsistent with local policy. Howlett v. Rose, 496 U.S. 356, 372, 110 S.Ct. 2430, 110 L.Ed.2d 332 (1990). Thus, despite a court

rule that vests the Washington Supreme Court with exclusive jurisdiction over suits challenging the lawyer disciplinary system, that rule does not necessarily defeat superior court jurisdiction when a plaintiff brings a challenge in a superior court under Section 1983. Eugster v. Wash. State Bar Ass'n, 198 Wn.App. 758, 397 P.3d 131, review denied 189 Wn.2d 1018 (2017).

Sufficiency of complaint. A complaint fails to state a claim under Section 1983 if it merely sets forth a conclusion that there is a nexus between the plaintiff, each defendant, and the conduct that created the constitutional tort. According to the United States Supreme Court's analysis, federal courts should use a two-step approach when deciding a CR 12(b)(6) motion to dismiss: first, ignore all conclusory allegations; second, determine the facial plausibility of the non-conclusory factual allegations. Ashcroft v. Iqbal, 556 U.S. 662, 678–79, 129 S.Ct. 1937, 173 L.Ed.2d 868 (2009); Bell Atlantic Corp. v. Twombly, 550 U.S. at 555. The Washington Supreme Court has rejected the "facial plausibility" standard used in *Iqbal* and *Twombly*. McCurry v. Chevy Chase Bank, FSB, 169 Wn.2d 96, 233 P.3d 861 (2010). Under *McCurry*, dismissal under CR 12(b)(6) is only appropriate where "even if what the plaintiff alleges is true, the law does not provide a remedy." McCurry v. Chevy Chase Bank, FSB, 169 Wn.2d at 102.

Controlling authority and persuasive authority. The United States Supreme Court is the only court with appellate jurisdiction to be the court of last resort when resolving a conflict in federal law for opinions that are issued by different circuits of the United States Court of Appeals, by the supreme courts of different states, and for conflicts between federal court opinions and state court opinions. District of Columbia Court of Appeals v. Feldman, 460 U.S. 462, 482–87, 103 S.Ct. 1303, 75 L.Ed.2d 206 (1983); see also Exxon Mobil Corp. v. Saudi Basic Indus. Corp., 544 U.S. 280, 283–88, 125 S.Ct. 1517, 161 L.Ed.2d 454 (2005); Rooker v. Fid. Trust Co., 263 U.S. 413, 414–16, 44 S.Ct. 149, 68 L.Ed. 362 (1923); Steinglass, Section 1983 Litigation in State Courts, section 5:8, pp. 5-42 and 5-43; Sup.Ct.R. 17.1(b); 28 U.S.C. § 1257.

The Washington Supreme Court has interpreted provisions of the Washington Constitution to be broader than corresponding provisions of the United States Constitution. In particular, the court has determined that Article I, Section 7 of the state constitution provides more protections to individuals than required under the Fourth Amendment to the federal constitution. Do not draft jury instructions in Section 1983 cases based on anything other than federal constitutional violations. State v. Gunwall, 106 Wn.2d 54, 720 P.2d 808 (1986). State constitutional violations and violations of state statutes are not actionable under Section 1983.

Published opinions of the Washington Supreme Court and Washing-

ton Court of Appeals are controlling authorities for state law. Federal and state law may interact in a constitutional tort case; for example, federal constitutional law determines whether the state's law has created a due process right actionable under Section 1983. Town of Castle Rock v. Gonzales, 545 U.S. 748, 756–57, 125 S.Ct. 2796, 162 L.Ed.2d 658 (2005).

According to principles of stare decisis and considering the purpose and structure of the federal and state court systems under the United States Constitution, our state courts are not required to follow decisions of the United States Court of Appeals or United States District Court (including decisions of the Ninth Circuit, the Western District of Washington, or any other) in Section 1983 litigation. See Rousso v. State, 149 Wn.App. 344, 363, 204 P.3d 243 (2009), affirmed 170 Wn.2d 70, 239 P.3d 1084 (2010); S.S. v. Alexander, 143 Wn.App. 75, 100–14, 177 P.3d 724 (2008) (Washington Court of Appeals may choose the most well-reasoned opinion from lower federal courts, and is not bound by Ninth Circuit precedent concerning federal statutes and constitutional rights). Decisions of the United States Court of Appeals for the Ninth Circuit are persuasive authority; it is beneficial for state and federal courts in Washington State to strive for predictable and uniform interpretation when construing provisions of the United States Constitution. See Martin v. Hunter's Lessee, 14 U.S. (1 Wheat.) 304, 346–48 (1816).

Our state trial courts must follow these controlling authorities for interpretation of federal law (listed in descending order of binding authority)—published opinions of: the United States Supreme Court; the Washington Supreme Court; and the Washington Court of Appeals. See Cooper v. Aaron, 358 U.S. 1, 18–20, 78 S.Ct. 1401, 3 L.Ed.2d 5 (1958); Rousso v. State, 149 Wn.App. 344, 363, 204 P.3d 243 (2009), affirmed 170 Wn.2d 70, 239 P.3d 1084 (2010); State v. Radcliffe, 139 Wn.App. 214, 222–24, 159 P.3d 486 (2007), affirmed 164 Wash. 2d 900, 194 P.3d 250 (2008).

Local government liability. At one time, based on Monroe v. Pape, 365 U.S. 167, 81 S.Ct. 473, 5 L.Ed.2d 492 (1961), governmental entities could not be sued under Section 1983 because they were not considered "persons" under the wording of the statute. In 1978 the Supreme Court reversed this position, with regard to local governmental entities; the Court did retain the view, however, that such entities should not be held vicariously liable for the acts of their employees on the basis of *respondeat superior*. Monell v. Dep't of Social Services, 436 U.S. 658, 98 S.Ct. 2018, 56 L.Ed.2d 611 (1978). As a result, there are special claims and defenses that apply to governmental entities as defendants, and to defendants acting in their "official capacities," and special instructions are set forth at WPI Chapter 341 (Civil Rights—Municipal and Local Government Liability).

There are also defenses available to defendants sued in their indi-

vidual capacities, such as qualified immunity, see the Comment to WPI 340.01 (Claims Instruction for Section 1983 Cases), which are not available to defendants sued in their official capacities or to governmental entities. See the Comment to WPI 341.01 (Civil Rights—Municipal and Local Government Liability—General Introductory Instruction).

State immunity. The state itself, its officials sued in their official capacity, and state agencies subject to Eleventh Amendment immunity, are not "persons" subject to suit for damages under Section 1983 in federal or state court. Will v. Michigan Dep't of State Police, 491 U.S. 58, 109 S.Ct. 2304, 105 L.Ed.2d 45 (1989); Wash. State Republican Party v. Pub. Disclosure Com'n, 141 Wn.2d 245, 285–86, 4 P.3d 808 (2000); Edgar v. State, 92 Wn.2d 217, 595 P.2d 534 (1979). See the Comment to WPI 341.01 (Civil Rights—Municipal and Local Government Liability—General Introductory Instruction).

Causation. For discussions of causation, see WPI 340.02 (Civil Rights—Individual Defendant—Burden of Proof on the Issues), 340.04 (Civil Rights—"Subjects" and "Causes to be Subjected"—Definition), and WPI 340.06 (Causation—Comment Only).

Section 1981. Title 42, Section 1981, not addressed in these instructions, applies to discrimination by private parties in employment or in other contract matters. For a discussion of the elements of a Section 1981 case, see Gen'l Bldg. Contractors Ass'n v. Pennsylvania, 458 U.S. 375, 388–91, 102 S.Ct. 3141, 73 L.Ed.2d 835 (1982).

Section 1985. Title 42, Section 1985, issues involving conspiracies to interfere with civil rights are not addressed in this chapter. For discussion and application of the elements of Section 1985(3) (conspiracy to deprive members of protected class of equal protection of the laws or equal privileges and immunities) see, e.g., Bray v. Alexandria Women's Health Clinic, 506 U.S. 263, 113 S.Ct. 753, 122 L.Ed.2d 34 (1993); Griffin v. Breckenridge, 403 U.S. 88, 102–03, 91 S.Ct. 1790, 1798, 29 L.Ed.2d 338 (1971); Torrey v. City of Tukwila, 76 Wn.App. 32, 38, 882 P.2d 799. The requirements of Section 1985(2) conspiracies to deny access to federal courts or to intimidate federal witnesses are discussed in cases such as Portman v. County of Santa Clara, 995 F.2d 898 (9th Cir. 1993) (denial of access), and Rutledge v. Arizona Board of Regents, 859 F.2d 732 (9th Cir. 1988) (witness intimidation).

[Current as of September 2018.]

WPI 340.01

CLAIMS INSTRUCTION FOR SECTION 1983 CASES

(1) (Name of plaintiff) **claims that** (name of defendant) **[subjected [him] [her] [it]] [caused [him] [her] [it] to be subjected] to the deprivation of a [constitutional] [federal statutory] right, in that** (name of defendant) **has:**

(Set forth in simple form without undue emphasis or repetition those claims by the plaintiff that have not been withdrawn or ruled out by the court and are supported by the evidence. Summary descriptions of typical constitutional claims are set forth in the Comment below.)

(Name of plaintiff) **claims that [**(name of defendant) **was acting under color of law at the time of the incident, and that]** (name of defendant)'s **conduct was a [proximate] cause of injuries or damage to** (name of plaintiff). (Name of defendant) **denies these claims.**

(2) [In addition, defendant (name of individual defendant) **claims the following affirmative defense[s]:**

(Set forth in simple form without undue emphasis or repetition any affirmative defenses that have not been withdrawn or ruled out by the court and are supported by the evidence.)

(Name of plaintiff) **denies these claims.]**

(3) [In addition, the defendant (name of municipal defendant) **claims the following affirmative defenses:**

(Set forth in simple form without undue emphasis or repetition any affirmative defenses that have not been withdrawn or ruled out by the court and are supported by the evidence.)

(Name of plaintiff) **denies these claims.]**

(4) [(Name of defendant) further denies that (name of plaintiff) was injured or sustained damage.]

(5) [(Name of defendant) further denies the nature and extent of the claimed injuries or damage.]

NOTE ON USE

Select the bracketed phrases or sentences as applicable.

This instruction is based upon the format of WPI 20.01 (Issues), adapted for a civil rights action under Section 1983, Title 42, U.S.C.A. Causes of action under Sections 1981 (contractual issues) and 1985 (conspiracy) are not addressed in these instructions. See WPI 340.00 (Civil Rights—Introduction).

This instruction, adapted appropriately, is designed for use in all Section 1983 cases. With regard to individual defendants, this instruction should be combined with instructions drawn from the remainder of WPI Chapter 340 (General Introductory Instructions). With regard to defendants that are local governmental entities, or individuals acting in their official capacities, combine this instruction with applicable instructions from WPI Chapter 341 (Municipal and Local Government Liability). See WPI 340.00 (Civil Rights—Introduction).

Regarding the bracketed word "proximate," see the detailed discussion of causation issues found in WPI 340.06 (Civil Rights—Causation—Comment Only). Instructions on causation must be carefully tailored to the specific case. See also WPI 340.02 (Civil Rights—Individual Defendant—Burden of Proof on the Issues), WPI 340.04 (Civil Rights—"Subjects" and "Causes to be Subjected"—Definition), WPI 343.02 (Conditions of Confinement—Eighth Amendment—Deliberate Indifference—General Conditions of Confinement), and WPI 343.04, (Conditions of Confinement—Eighth Amendment—Deliberate Indifference—Medical), and the Notes on Use and Comments to these instructions.

The numbers in parentheses preceding each paragraph should not be included when the instruction is given. They are used here for convenience in referring to paragraphs in this note and when instructions are being prepared for a particular case.

Paragraph (1) will always be used. In that paragraph, practitioners will need to summarize the constitutional claim at issue. See the Comment for examples of typical claim summaries. Insert the bracketed reference to "acting under color of law" if that is a contested issue in the case, and also use with WPI 340.03 (Civil Rights—"Under Color of Law"—Definition).

The pertinent paragraphs (2) through (5) should be selected according to the issues properly in the case and supported by the evidence. Paragraphs (2) and (3) are set forth separately, because defendants sued in their individual capacities have different defenses available to them than individuals sued in their official capacities or governmental entities, collectively designated municipal defendants. See the Comment below and the Comment to WPI 341.01 (Civil Rights—Municipal and Local Government Liability—General Introductory Instruction).

The instruction uses the word "persons." Section 1983 protects U.S. citizens and others who are within the jurisdiction of the United States. If factual issues exist as to whether the plaintiff falls within this scope, then the instruction will need to be modified.

If the case contains another type of claim, such as an action in tort, care should be taken to label the civil rights or Section 1983 instructions as such.

If the case involves a counter-claim by defendant, see WPI 20.02 (Issues—Claim and Counterclaim).

COMMENT

General. This instruction was modified for this edition. The previous introductory paragraphs that set forth the text of 42 U.S.C.A. Section 1983 have been removed. Those paragraphs were duplicative of the remainder of the instruction. This is an introductory instruction designed to acquaint the jury with the general subject matter of the Section 1983 lawsuit.

A cause of action under Section 1983 requires proof that the defendant acted under color of state law, and that the defendant deprived the plaintiff of a right protected by the federal constitution or federal statute. Sintra, Inc. v. Seattle, 119 Wn.2d 1, 829 P.2d 765 (1992); Torrey v. City of Tukwila, 76 Wn.App. 32, 37, 882 P.2d 799 (1994). Generally, claims against federal actors are not actionable under Section 1983. Daly-Murphy v. Winston, 837 F.2d 348, 355 (9th Cir. 1987). However, if federal actors are found to have conspired with or acted in concert with state officials to some substantial degree, then they may be found to have acted under color of state law and their conduct may be actionable. See, e.g., Merritt v. Mackey, 932 F.2d 1317 (9th Cir. 1991); Knights of the Klu Klux Klan v. East Baton Rouge Parish Sch. Bd., 735 F.2d 895, 900 (5th Cir. 1984).

Citizens and others within the jurisdiction of the United States. Section 1983 protects not only U.S. citizens, but also others within the jurisdiction of the United States. Accordingly, non-citizens may be covered under some circumstances. See Lynch v. Cannatella,

810 F.2d 1363, 1372–73 (5th Cir. 1987) (holding that the plaintiff was entitled to protection under the Fifth and Fourteenth Amendments against "gross physical abuse at the hands of state or federal officials" even though the plaintiff was an "excludable alien").

Whether a plaintiff qualifies as a citizen or as being within the jurisdiction of the United States will usually be determined as a matter of law. If factual issues exist, the instruction will need to be modified.

Examples of claim descriptions for use in paragraph (1). Section 1983 covers a wide variety of constitutional claims. For some of the more typical claims, the WPI Committee sets forth below examples of how these claims may be summarized for purposes of the instruction's paragraph (1). Practitioners should replace the labels "plaintiff" and "defendant" in these examples with the names of the parties.

(1) [the defendant used unreasonable force against the plaintiff, depriving [him] [her] of a right guaranteed by the Fourth Amendment of the Constitution. The Fourth Amendment guarantees every person the right to be secure against unreasonable seizures of the person.]

(2) [the defendant subjected [the plaintiff] to an unreasonable search of [his] [her] [person] [home] [papers and effects], depriving [him] [her] of a right guaranteed by the Fourth Amendment to the Constitution. The Fourth Amendment guarantees every person the right to be secure in his or her [person] [home] [papers and effects] against unreasonable searches and seizures.]

(3) [the defendant [seized the plaintiff without reasonable suspicion] [arrested the plaintiff without probable cause], thereby depriving [him] [her] of a right guaranteed by the Fourth Amendment to the Constitution. The Fourth Amendment guarantees every person the right to be secure in his or her person against unreasonable searches and seizures.]

(4) [the defendant deprived the plaintiff of life, liberty, or property without due process of law as guaranteed by the Fourteenth Amendment to the Constitution.]

(5) [the defendant took the plaintiff's private property for public use without just compensation, thereby depriving [him] [her] of a right guaranteed by the Fifth Amendment to the Constitution.]

(6) [the defendant deprived the plaintiff of equal protection of the

laws as guaranteed by the Fourteenth Amendment to the Constitution.]

(7) [the defendant subjected the plaintiff to cruel and unusual punishment in violation of the Eighth Amendment to the Constitution.]

(8) [the defendant deprived the plaintiff of [his] [her] [its] right to freedom of speech in violation of the First Amendment to the Constitution.]

Color of law. The "color of law" element may be admitted or established by the court as a matter of law. See the Comment to WPI 340.03 (Civil Rights—"Under Color of Law"—Definition). It may be advisable to instruct the jury if color of law is not an issue. Cf. WPI 32.01 (Admitted Liability or Directed Verdict—Issues and Burden of Proof).

Causation. See the discussion of causation issues in WPI 340.02 (Civil Rights—Individual Defendant—Burden of Proof on the Issues), WPI 340.04 (Civil Rights—"Subjects" and "Causes to be Subjected"—Definition), and WPI 340.06 (Civil Rights—Causation—Comment Only).

Corporate plaintiff. The impersonal pronoun is included in the instruction because in appropriate circumstances a corporation may be a Section 1983 plaintiff. See CarePartners LLC v. Lashway, 545 F.3d 867 (9th Cir. 2008); Gomez v. Alexian Bros. Hosp., 698 F.2d 1019 (9th Cir.1983); Soranno's Gasco., Inc. v. Morgan, 874 F.2d 1310 (9th Cir. 1989). But see Erlich v. Glasner, 418 F.2d 226, 228 (9th Cir. 1969) (shareholder lacks standing).

Affirmative defenses. Affirmative defenses should be included when they involve jury issues. See, e.g., Smiddy v. Varney, 665 F.2d 261 (9th Cir. 1981) (independent prosecution), called into doubt on other grounds in Beck v. City of Upland, 527 F.3d 853, 864–65 (9th Cir. 2008).

Qualified immunity. Individual defendants in a Section 1983 action are entitled to qualified immunity from damages for civil liability if their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known. Harlow v. Fitzgerald, 457 U.S. 800, 818, 102 S.Ct. 2727, 73 L.Ed.2d 396 (1982).

Qualified immunity is determined using a two-part test: first, whether the plaintiff has sufficient facts to support finding a violation of a constitutional right; and second, whether the constitutional right at issue was clearly established. The trial court has discretion to decide which part should be analyzed first, because one or the other question may be dispositive on summary judgment. Pearson v. Callahan, 555 U.S. 223, 236, 129 S.Ct. 808, 172 L.Ed.2d 565 (2009).

To determine whether a federal right is clearly established, courts "do not require a case directly on point, but existing precedent must have placed the statutory or constitutional question beyond debate." Ashcroft v. al-Kidd, 563 U.S. 731, 741, 131 S.Ct. 2074, 2083, 179 L.Ed.2d 1149 (2011) (in a *Bivens* cause of action, the Court held that the United States Attorney General enjoyed qualified immunity, because there was no clearly established right concerning the Attorney General's approval of a material witness warrant for a terrorism suspect under then-existing Fourth Amendment jurisprudence). The qualified immunity inquiry is whether the federal right, under the constitution or laws of the United States, would have been clear to a reasonable defendant: "A Government official's conduct violates clearly established law when, at the time of the challenged conduct, '[t]he contours of [a] right [are] sufficiently clear' that every 'reasonable official would have understood that what he is doing violates that right.' " Ashcroft v. al-Kidd, 563 U.S. at 741; see also Torres v. City of Madera, 648 F.3d 1119, 1124 (9th Cir. 2011) (holding that a police officer was not entitled to qualified immunity when Ninth Circuit case law made it clear that firing a gun at the chest of an unarmed, immobilized suspect was an unreasonable use of force; no qualified immunity when the officer mistakenly thought she had a taser gun in her hand instead of her pistol).

Normally, qualified immunity is decided by the court. Because it is an immunity from suit and not merely an affirmative defense, Mitchell v. Forsyth, 472 U.S. 511, 526, 105 S.Ct. 2806, 2815–16, 86 L.Ed.2d 411 (1985), the court should resolve the issue of qualified immunity as soon as practicable. Pearson v. Callahan, 555 U.S. 223, 232, 129 S.Ct. 808, 172 L.Ed.2d 565 (2009).

State law may be used as part of the analysis to determine whether a seizure was reasonable. State law is relevant as to probable cause; state law is used to analyze whether the federal constitutional right under the Fourth Amendment was clearly established in the context of the state criminal law that the officers were using as a basis for the arrest. Pierce v. Multnomah County, 76 F.3d 1032, 1038–39 (9th Cir. 1996).

Qualified immunity issues should only be submitted to the jury for determination when there are genuine issues of material fact. Johnson v. Jones, 515 U.S. 304, 313–20, 115 S.Ct. 2151, 132 L.Ed.2d 238 (1995).

If issues of fact need to be determined by the trier of fact before the court can make a determination on qualified immunity, these issues may be presented as a list of questions in a special verdict form. See Torres v. City of Los Angeles, 548 F.3d 1197, 1210–12 (9th Cir. 2008); Ortega v. O'Connor, 146 F.3d 1149, 1154–57 (9th Cir. 1998) (qualified immunity instruction upheld).

Avoiding comments on the evidence. When a trial court

describes the relevant factors and the factual basis of the claim in a jury instruction, the Washington State Constitution, article IV, section 16 prohibits the trial court from commenting on the evidence. If the court takes care to refrain from either explaining or criticizing evidence, and the court avoids any suggestion that the evidence proves a fact or element at issue, there is no comment on the evidence. See WPI 1.01 (Advance Oral Instruction—Beginning of Proceedings); Const. art. IV, § 16; Kerr v. Cochran, 65 Wn.2d 211, 214–18, 396 P.2d 642 (1964); Tegland, 14A Wash. Prac., Civil Procedure § 31:20 (2d ed.).

[Current as of September 2018.]

WPI 340.02

CIVIL RIGHTS—INDIVIDUAL DEFENDANT—BURDEN OF PROOF ON THE ISSUES

[On [his] [her] [its] Section 1983 claims,] (name of plaintiff) **has the burden of proving each of the following propositions:**

(1) That at the time of the incident, (name of defendant) **was acting under color of law;**

(2) That (name of defendant) (insert the mens rea that applies under the specific constitutional or statutory analysis) **[did] [or] [did not do] certain acts;**

(3) That the [acts] [or] [omissions] of (name of defendant) **[subjected** (name of plaintiff)**] [caused** (name of plaintiff) **to be subjected] to the deprivation of rights protected by the Constitution or the laws of the United States; and**

(4) That (name of defendant's) **actions [proximately] caused injury or damage to** (name of plaintiff).

If you find from your consideration of all of the evidence that each of these propositions has been proved, your verdict should be for (name of plaintiff) **[on this claim]. On the other hand, if any of these propositions have not been proved, your verdict should be for** (name of defendant) **[on this claim].**

NOTE ON USE

Use this instruction with WPI 21.01 (Meaning of Burden of Proof—Preponderance of Evidence).

The specific federal constitutional or statutory right at issue should be inserted in paragraph (3). See the Comment to WPI 340.01 (Claims Instruction for Section 1983 Cases).

This instruction sets out the basic format for a claim under Section

1983. Specific types of constitutional violation may require other elements of proof; examples are provided in the Comments and pattern instructions in WPI Chapter 340 and other WPI chapters on civil rights.

Regarding the bracketed word "proximately," see the detailed discussion of causation issues found in WPI 340.06 (Civil Rights—Causation—Comment Only). Instructions on causation must be carefully tailored to the specific case. See also WPI 340.04 (Civil Rights—"Subjects" and "Causes to be Subjected"—Definition), WPI 343.02 (Conditions of Confinement—Eighth Amendment—Deliberate Indifference—General Conditions of Confinement), and WPI 343.04, (Conditions of Confinement—Eighth Amendment—Deliberate Indifference—Medical), and the Notes on Use and Comments to these instructions.

In paragraph (2), fill in the applicable *mens rea* requirement. For some cases, the requirement is deliberate indifference, rather than intentionality.

Use this instruction with appropriate instructions from WPI Chapter 348 (Civil Rights—Damages and Verdict Forms). Use the last paragraph of this instruction with a general verdict form, or omit the last paragraph and use this instruction with an appropriate special verdict form, such as WPI 348.10 (Civil Rights—Fourth Amendment—Unreasonable Force—No Punitive Damages—Individual Defendant—Special Verdict Form).

Use the bracketed phrases referring to the Section 1983 claim in the first and last paragraphs if the civil rights claim is combined with other claims.

COMMENT

The instruction is modified from a pattern instruction used by the Ninth Circuit. See Ninth Cir. Civ. Jury Instr. 9.3 (2007); see also Third Cir. Civ. Jury Instr. 4.3 (2016).

Elements. The essential elements of a Section 1983 cause of action have been variously phrased, but are well established. "There are only two essential elements in a [Section] 1983 action: (1) the plaintiff must show that some person deprived it of a federal constitutional or statutory right, and (2) that person must have been acting under color of state law." Sintra v. City of Seattle, 119 Wn.2d 1, 11, 829 P.2d 765 (1992). See also Thomas v. Carpenter, 881 F.2d 828 (9th Cir. 1989); Robinson v. City of Seattle, 119 Wn.2d 34, 58, 830 P.2d 318 (1992); Torrey v. City of Tukwila, 76 Wn.App. 32, 37, 882 P.2d 799 (1994).

Mens rea. While an action under 42 U.S.C § 1983 does not require a showing that an individual defendant acted with any "specific intent"

to deprive the claimant of constitutional right, the claim still requires that the plaintiff prove that the defendant acted with a particular *mens rea* as part of the proof necessary to show violation of a constitutional right. See, e.g., Bryan County Comm'rs v. Brown, 520 U.S. 397, 405, 117 S.Ct. 1382, 137 L.Ed.2d 626 (1997) (municipal liability; deliberate indifference standard for failure to properly screen job applicants); Bryan v. Jones, 530 F.2d 1210 (5th Cir. 1976) (for claims of false arrest or false imprisonment in violation of the Fourth Amendment, the plaintiff must prove an intent to commit an act that resulted in the arrest or imprisonment). Neither recklessness nor gross negligence are sufficient to establish a Section 1983 claim against an individual defendant. L.W. v. Grubbs, 92 F.3d 894 (9th Cir. 1996); see also Uhlrig v. Harder, 64 F.3d 567 (10th Cir. 1995) (suggesting recklessness with deliberate indifference would suffice).

The statutory language of Section 1983 provides that a person may either "subject" another to a deprivation of a federal right or "cause [them] to be subjected" to such a deprivation. See Johnson v. Duffy, 588 F.2d 740, 743–44 (9th Cir. 1978), and the Comment to WPI 340.04 (Civil Rights—"Subjects" and "Causes to be Subjected"—Definition).

Damages are not an essential element of the plaintiff's cause of action. See, e.g., George v. City of Long Beach, 973 F.2d 706 (9th Cir. 1992) (nominal damages awarded for constitutional violation when jury found injuries to plaintiff were not proximately caused by illegal entry). With regard to some specific types of constitutional rights, however, the plaintiff may be required to show a specified injury in order to demonstrate the deprivation. See, e.g., Venegas v. Wagner, 831 F.2d 1514 (9th Cir. 1987) (denial of right to fair trial requires proof that conduct of defendant proximately caused conviction and resulting damages). See WPI 340.04 (Civil Rights—"Subjects" and "Causes to be Subjected"—Definition) and WPI 340.06 (Civil Rights—Causation—Comment Only) for further discussion of causation.

There are also special requirements for showing other particular types of constitutional deprivation. Establishing a cause of action under Section 1983 for violation of a right to procedural due process, for example, requires proof of the following elements: (1) a liberty or property interest protected by the Constitution; (2) deprivation of the interest by the government; and (3) lack of due process. Portman v. County of Santa Clara, 995 F.2d 898 (9th Cir. 1993) (analysis of interest in employment). See also Meyer v. Univ. of Wash., 105 Wn.2d 847, 719 P.2d 98 (1986).

For Fourth Amendment claims, see WPI Chapter 342 (Civil Rights—Fourth Amendment—Unreasonable Search and Seizure). Regarding requirements of other specific types of constitutional claims, see also Sintra, Inc. v. City of Seattle, 119 Wn.2d 1, 829 P.2d 765 (1992) (substantive due process, property rights); Grader v. City of Lynnwood,

53 Wn.App. 431, 767 P.2d 952 (1989) (deprivation of property claim, equal protection and substantive due process), as clarified in Lutheran Day Care v. Snohomish County, 119 Wn.2d 91, 829 P.2d 746 (1992).

[Current as of September 2018.]

WPI 340.03

CIVIL RIGHTS—"UNDER COLOR OF LAW"—DEFINITION

A[n] [person] [or] [entity] acts under color of law when acting or purporting to act in the performance of official duties under any state, county, or municipal law, ordinance, [or] regulation[, custom or usage]. [[The parties have stipulated that] [The court has found that] the defendant acted under color of law.]

NOTE ON USE

Use this instruction in Section 1983 cases against an individual defendant, along with WPI 340.02 (Civil Rights—Individual Defendant—Burden of Proof on the Issues).

Use the bracketed phrase "custom or usage" when the issue of custom or usage is raised by the facts of the case. When the issue of "acting under color of law" is not submitted for jury determination, because it has been admitted or because the court has decided the issue as a matter of law, use the last bracketed sentence.

COMMENT

This instruction is similar to the Ninth Circuit's Civil Jury Instruction 9.3 (2007), although the instruction above includes a bracketed reference to "custom or usage," as set forth in the statute.

A private corporation or other entity acts under color of law under Section 1983 when "there is such a close nexus between the State and the challenged action that seemingly private behavior may fairly be treated as that of the State itself." Brentwood Acad. v. Tenn. Secondary Sch. Athletic Ass'n, 531 U.S. 288, 295, 121 S.Ct. 924, 148 L.Ed.2d 807 (2001) (internal quotation marks and citations omitted). The issue of whether the nexus is sufficiently close is determined by analyzing the specific relationships as revealed by the law and facts of each case. See Villegas v. Gilroy Garlic Festival Ass'n, 541 F.3d 950 (9th Cir. 2008) (en banc) (applying *Brentwood Academy*, and holding that the defendant was not acting under color of law). See also West v. Atkins, 487 U.S. 42, 108 S.Ct. 2250, 101 L.Ed.2d 40 (1988); Jackson v. Metro. Edison Co., 419 U.S. 345, 351–52, 95 S.Ct. 449, 42 L.Ed.2d 477 (1974).

For discussions of when private individuals may be acting under

color of state law by jointly acting with state officials, see Adickes v. S. H. Kress & Co., 398 U.S. 144, 149, 90 S.Ct. 1598, 1605, 26 L.Ed.2d 142 (1970) (private parties, acting jointly with state officials in prohibited conduct, act "under color of law"); United Steelworkers v. Phelps Dodge Corp., 865 F.2d 1539, 1540 (9th Cir. 1989) (en banc). The instruction should be modified for cases that fall into this category.

Customs or usages, although not incorporated in statute or ordinance, may qualify as "under color of law" if they "have the force of law by virtue of the persistent practice of state officials." Adickes v. S. H. Kress & Co., 398 U.S. at 167.

[Current as of September 2018.]

WPI 340.04

CIVIL RIGHTS—"SUBJECTS" AND "CAUSES TO BE SUBJECTED"—DEFINITION

[A person subjects another to the deprivation of a [constitutional] [statutory] right, within the meaning of Section 1983, if [he] [she] does an affirmative act, participates in another's affirmative act, or does not perform an act which [he] [she] is legally required to do that causes the deprivation.]

[A person causes another to be subjected to the deprivation of a [constitutional] [statutory] right, within the meaning of Section 1983, by direct personal participation in the deprivation, or by setting in motion a series of acts by others [or] [by failing to stop the acts of others,] [or by failing to investigate the acts of others], which the person knows or reasonably should know would cause others to violate the [constitutional] [statutory] right.]

NOTE ON USE

Use in Section 1983 cases against an individual defendant. Use the bracketed language as appropriate.

COMMENT

This instruction is taken from the language of Johnson v. Duffy, 588 F.2d 740, 743–44 (9th Cir. 1978).

A defendant may be liable for culpable inaction, as well as action. Clem v. Lomeli, 566 F.3d 1177 (9th Cir. 2009). In certain cases, additional instructions may be needed to clarify for the jury how a person could "cause another to be subjected" by failing to stop another person's activity, or by failing to investigate the activities of another person, or other such inaction—especially in a case involving a written policy that proscribes particular conduct by employees. See Hunter v. County of Sacramento, 652 F.3d 1225 (9th Cir. 2011).

A defendant is liable "not only for conduct that directly violates a right but for conduct that is the effective cause of another's direct infliction of the constitutional injury." Sales v. Grant, 158 F.3d 768, 776 (4th Cir. 1998). Under this standard, a defendant becomes individually li-

able by "setting in motion a series of acts by others which the actor knows or reasonably should know would cause others to inflict the constitutional injury." Lakeside-Scott v. Multnomah County, 556 F.3d 797, 804–05 (9th Cir. 2009); see also Sales v. Grant, 158 F.3d at 776; Citoli v. City of Seattle, 115 Wn.App. 459, 487–88, 61 P.3d 1165 (2002). Compare the requirements for municipal liability, or the liability of a defendant in his or her official capacity, WPI Chapter 341 (Civil Rights—Municipal and Local Government Liability).

For further discussion of causation issues, see WPI 340.06 (Civil Rights—Causation—Comment Only).

[Current as of September 2018.]

WPI 340.05

CIVIL RIGHTS—FAILURE TO TRAIN OR INADEQUATE TRAINING—MUNICIPAL LIABILITY—"DELIBERATE INDIFFERENCE"—DEFINITION

COMMENT

The instruction on "deliberate indifference" can be found in WPI Chapter 341 (Civil Rights—Municipal and Local Government Liability), where the other instructions on municipal and local government liability are found. See WPI 341.04 (Civil Rights—Failure to Train or Inadequate Training—Municipal Liability—"Deliberate Indifference"—Definition).

[Current as of September 2018.]

WPI 340.06

CIVIL RIGHTS—CAUSATION—COMMENT ONLY

COMMENT

Under Section 1983, the plaintiff must prove that the defendant subjected (directly caused), or caused the plaintiff to be subjected (indirectly caused), to a deprivation of federal rights. See WPI 340.04 (Civil Rights—"Subjects" and "Causes to Be Subjected"—Definition). The statute does not specify whether the direct or indirect causation involves traditional common law tort concepts of proximate causation. Section 1983 requires that the plaintiff prove two causal links: (1) a causal relationship between the defendant's conduct and the deprivation of the plaintiff's federal rights; and (2) a causal relationship between the deprivation and the plaintiff's injury or damages.

A. Washington appellate opinions. Washington Supreme Court opinions have not specified whether they are addressing the first or second link. See, e.g., Mission Springs, Inc. v. City of Spokane, 134 Wn.2d 947, 964–65, 954 P.2d 250 (1998) (finding that a Section 1983 due process claim was ripe because the harm occurred immediately upon government action); Sintra, Inc. v. City of Seattle, 131 Wn.2d 640, 654–55, 935 P.2d 555 (1997) (*Sintra II*) (discussing the jury's finding as to whether the defendant's conduct was a proximate cause of "harm" to the plaintiff); Lutheran Day Care v. Snohomish County, 119 Wn.2d 91, 124–25, 829 P.2d 746 (1992) (substantive due process violation, causation discussed but not analyzed).

The Washington Court of Appeals, in a substantive due process case, relied on Arnold v. I.B.M., 637 F.2d 1350 (9th Cir. 1981), and held that the first link of causation under Section 1983 required proof of cause-in-fact and proximate cause between the defendant's actions and the deprivation of federal rights. Gausvik v. Abbey, 126 Wn.App. 868, 885–87, 107 P.3d 98 (2005); see also, Morinaga v. Vue, 85 Wn.App. 822, 834, 935 P.2d 637 (1997); In re Estate of Hansen, 81 Wn.App. 270, 285–92, 914 P.2d 127 (1996). In *Gausvik,* the court rejected the substantial factor test. Gausvik v. Abbey, 126 Wn.App. at 887. It is important to consider that *Gausvik* is a substantive due process case, and the causation analysis is specific to that type of case. For examples of the causal relationship between the defendant's act or omission and the alleged deprivation of a specific federal right, as well as causation under different theories of liability, see examples in Part D of this Comment, infra.

B. United States Supreme Court precedent. The U.S. Supreme Court has expressly declined to answer the question of proximate causation. See Martinez v. California, 444 U.S. 277, 285, 100 S.Ct. 553,

559, 62 L.Ed.2d 481 (1980) (holding that liability may be imposed only if the link between the defendant's conduct and the deprivation of rights is not "too remote," but declining to address whether the link is one of traditional proximate causation under the common law of torts); see also DeShaney v. Winnebago County Dept. of Soc. Servs., 489 U.S. 189, 197 n.4, 201–202, 109 S.Ct. 998, 103 L.Ed.2d 249 (1989).

In Malley v. Briggs, 475 U.S. 335, 344 n.7, 106 S.Ct. 1092, 89 L.Ed.2d 271 (1986), the Court explained that the element of causation under Section 1983 is not analyzed in lockstep with the common law tort concept of causation. The Court held in *Malley* that if a police officer who sought an arrest warrant and presented information to the magistrate did not have an objectively reasonable basis for believing there was probable cause to support the warrant, the officer would not be entitled to qualified immunity. Even if a magistrate made a determination of probable cause—an incorrect determination—and issued the arrest warrant to allow police to seize the plaintiff, the magistrate's action would not offer qualified immunity to a police officer if there was no objectively reasonable basis for the officer's warrant application. Malley v. Briggs, 475 U.S. at 345–46; see also Groh v. Ramirez, 540 U.S. 551, 563–64, 124 S.Ct. 1284, 157 L.Ed.2d 1068 (2004) (magistrate made a determination of probable cause and issued a search warrant, but the search warrant was defective on its face and the officer who sought the warrant was not entitled to qualified immunity); Bravo v. City of Santa Maria, 665 F.3d 1076, 1083–87 (9th Cir. 2011) (discussing causation in this context); In re Estate of Hansen, 81 Wn.App. 270, 285–92, 914 P.2d 127 (1996) (discussing causation in this context).

Similarly, in Hartman v. Moore, 547 U.S. 250, 258–266, 126 S.Ct. 1695, 164 L.Ed.2d 441 (2006), a *Bivens* case, the Court stated: "[W]e are ready to look at the elements of common-law torts when we think about elements of actions for constitutional violations . . . but the common law is best understood here more as a source of inspired examples than of prefabricated components of *Bivens* torts." Hartman v. Moore, 547 U.S. at 258; Bivens v Six Unknown Fed. Narcotics Agents, 403 U.S. 388, 91 S.Ct. 1999, 29 L.Ed.2d 619 (1971); see also, Flaxman, Note, Proximate Cause in Constitutional Torts: Holding Interrogators Liable for Fifth Amendment Violations At Trial, 105 Mich. L. Rev. 1551 (2007).

A *Bivens* cause of action is a lawsuit in which the plaintiff does not rely on Section 1983, but sues directly under the authority of the United States Constitution for injuries that are allegedly caused by unconstitutional behavior of federal agents, rather than agents of the state or local government. Case law from *Bivens* claims is often cross-referenced and applied in a similar fashion as case law from Section 1983 opinions. See, e.g., Ashcroft v. Iqbal, 556 U.S. 662, 675–77, 129 S.Ct. 1937, 173 L.Ed.2d 868 (2009).

The Court has held that with regard to municipal defendants, the

plaintiff must demonstrate a "direct" causal link between the municipal action and the deprivation of federal rights, such that the municipal action was the "moving force" that caused the deprivation. See the Comment to WPI 341.01 (Civil Rights—Municipal and Local Government Liability—General Introductory Instruction); Monell v. Dep't of Soc. Svcs., 436 U.S. 658, 694, 98 S.Ct. 2018, 56 L.Ed.2d. 611 (1978); Bryan County Comm'rs v. Brown, 520 U.S. 397, 404, 117 S.Ct. 1382, 1388, 137 L.Ed.2d 626 (1997); see also Serr, Turning § 1983's Protection of Civil Rights into an Attractive Nuisance: Extra-Territorial Barriers to Municipal Liability under Monell, 35 Ga. L. Rev. 881, 884–85 (2001) (noting the inconsistencies that exist between the Supreme Court's holdings that Section 1983 should be interpreted in terms of common law principles—presumably including proximate causation based on foreseeability—and its opinions analyzing causation in terms of obviously known consequences).

Causation is a more nuanced issue when a jury decides an individual defendant who is employed by the municipality is not liable, but nevertheless the jury determines the municipality is liable under a custom, practice, or policy. Compare City of Los Angeles v. Heller, 475 U.S. 796, 797–99, 801, 106 S.Ct. 1571, 89 L.Ed.2d 806 (1986) (no liability for municipality) with Thomas v. Cook County Sheriff's Dept., 604 F.3d 293, 303–05 (7th Cir. 2010) (county could be held liable even if employees were not).

Causation in a Section 1983 case must be interpreted in a manner consistent with federal law. See Howlett v. Rose, 496 U.S. 356, 110 S.Ct. 2430, 110 L.Ed.2d 332 (1990) (state law cannot be used to preclude litigation of a Section 1983 claim in state court if that claim would be allowed to proceed under federal law in federal court). The federal constitution and Section 1983 legislative intent should be considered to determine the source of the legal standard. See generally Hartman v. Moore, 547 U.S. 250, 126 S.Ct. 1695, 164 L.Ed.2d 441 (2006); Malley v. Briggs, 475 U.S. 335, 106 S.Ct. 1092, 89 L.Ed.2d 271 (1986); CSX Transp., Inc. v. McBride, 564 U.S. 685, 692–704, 131 S.Ct. 2630, 2637–43, 180 L.Ed.2d 637 (2011) (in a case under a federal railroad statute, the Court observed that jurors lack an understanding of the term "proximate cause" and found there was no indication that Congress intended to use the proximate cause standard); but see Staub v. Proctor Hosp., 562 U.S. 411, 131 S.Ct. 1186, 1191, 179 L.Ed.2d 144 (2011) (the Court relied on proximate cause under a different federal statute); Restatement (Third) of Torts: Liability for Physical and Emotional Harm, § 26 "Factual Cause" (2005); Restatement (Third) of Torts, Chapter 6, "Special Note on Proximate Cause" (2005); Restatement (Third) of Torts § 29 Part c—Scope of Liability (2005) (describing the reasons why scope of liability is the appropriate substantive analysis while "proximate cause" is a phrase that stands in for or symbolizes the gist of scope of liability as a concept; also arguing that "proximate cause" is a confusing term, and suggests that cause-in-fact is the better usage).

In two cases, the United States Supreme Court held that a plaintiff cannot recover compensatory damages for unspecified injury or ask the jury to award damages based on a subjective intrinsic value of the particular constitutional right allegedly violated; the plaintiff must prove actual injury in order to justify compensatory damages. See Memphis Cmty. Sch. Dist. v. Stachura, 477 U.S. 299, 106 S.Ct. 2537, 91 L.Ed.2d 249 (1986) (jury instructions erroneously allowed jurors to award damages based on intrinsic value of First and Fourteenth Amendment rights); Carey v. Piphus, 435 U.S. 247, 257–67, 98 S.Ct. 1042, 55 L.Ed.2d 252 (1978) (for deprivation of procedural due process, nominal damage award is permissible when deprivation occurred but there is no evidence of compensable injury).

C. Federal circuit courts. Causation is an evolving area of law. Federal pattern instructions published by the United States Courts of Appeals are a good resource for research and patterns. See, e.g., United States Court of Appeals for the Third Circuit, Civ. Jury Instr. 4.6.1 (Section 1983—Liability in Connection with the Actions of Another—Supervisory Officials) (2015) and 4.14 (Section 1983—State-Created Danger) (2015).

The Ninth Circuit requires that the plaintiff establish cause-in-fact and proximate cause in order to satisfy the first link in Section 1983's causation requirement. Harper v. City of Los Angeles, 533 F.3d 1010, 1026–27 (9th Cir. 2008); Arnold v. I.B.M. Corp., 637 F.2d 1350 (9th Cir. 1981). Other federal appellate courts have varied in their analysis of causation issues. See, e.g., Cash v. County of Erie, 654 F.3d 324, 341–42 (2nd Cir. 2011) (applying proximate cause standard, but failing to analyze the first and second links of causation); see also Kernodle, Note, Policing the Police: Clarifying the Test for Holding Government Liable under 42 U.S.C. § 1983 and the State Created Danger Theory, 54 Vand. L.Rev. 165, 182–84 (2001); Hessick, Standing, Injury in Fact, and Private Rights, 93 Cornell L. Rev. 275, 302–08 (2008).

In cases in which the plaintiff alleges that the defendant failed to act, an expanded jury instruction about causation is required. See Hunter v. County of Sacramento, 652 F.3d 1225 (9th Cir. 2011); see also Fischer, Causation in Fact in Omission Cases, 1992 Utah Law Rev. 1335, 1336, 1348, 1380 (1992).

Opinions of the federal courts echo some common themes. Causation instructions: (1) should be precise and consistent with the specific federal rights at issue; (2) should be tailored to the specific type of liability in each cause of action (e.g., a defendant who is an individual person, supervised person, direct supervisor, municipality, or other government defendant); (3) should describe the first causal link, between the defendant's conduct and the deprivation of rights, with *mens rea* and causation elements that are related to the precise constitutional

right at issue, and relevant to the theory of liability for each specific cause of action; and (4) in order to establish the second link—between the deprivation of federal rights and the resulting damages—the instruction should require an actual injury before compensatory damages can be awarded; there must also be a cause-in-fact connection between the constitutional deprivation and the actual injury or damage in order to justify compensatory damages, and proximate causation is normally required.

D. Examples of the causal relationship between the act or omission of defendant and the alleged deprivation of plaintiff's federal rights ("subjects or causes to be subjected").

1. First Amendment retaliation cases.

In a cause of action alleging that a public employer retaliated against the plaintiff for his or her exercise of First Amendment rights, a plaintiff is required to establish by a preponderance of the evidence: (1) that the employee engaged in speech that was constitutionally protected; (2) that the employer took an "adverse employment action" against the plaintiff; and (3) that the plaintiff's protected speech was a "substantial or motivating factor" for the defendant's adverse employment action. If the plaintiff makes this three-part showing, then the defendant must establish by a preponderance of the evidence that it would have reached the same adverse employment decision even in the absence of the protected speech. Lakeside-Scott v. Multnomah County, 556 F.3d 797, 803 (9th Cir. 2009) (citing Mt. Healthy City Sch. Dist. v. Doyle, 429 U.S. 274, 287, 97 S.Ct. 568, 50 L.Ed.2d 471 (1977)); see also Garcetti v. Ceballow, 547 U.S. 410, 126 S.Ct. 1951, 164 L.Ed.2d 689 (2006); Bd. of County Comm'rs v. Umbehr, 518 U.S. 668, 675, 116 S.Ct. 2342, 135 L.Ed.2d 843 (1996); White v. State, 131 Wn.2d 1, 11, 16–18, 20, 929 P.2d 396 (1997).

If the plaintiff is an independent contractor, the court ordinarily will determine the nature of the contracting relationship and decide whether the contractor is a private citizen, or an employee, for purposes of First Amendment analysis. Bd. of County Comm'rs v. Umbehr, 518 U.S. at 673–74. If the contractor is considered a public employee, there are "certain restraints that would be unconstitutional if applied to the general public," but for purposes of public employment, certain restrictions may be valid. City of San Diego v. Roe, 543 U.S. 77, 80, 125 S.Ct. 521, 160 L.Ed.2d 410 (2004) (per curiam); see Pickering v. Bd. of Educ., 391 U.S. 563, 88 S.Ct. 1731, 20 L.Ed.2d 811 (1968).

The test is a five-part inquiry: first, did the plaintiff speak about a matter of public concern?; second, did the plaintiff speak as a private citizen or as a public employee?; third, was plaintiff's protected speech a

substantial or motivating factor in the defendant's adverse employment action against the plaintiff?; fourth, did the defendant have adequate justification for treating the employee differently from other members of the public?; and fifth, would the defendant have imposed the adverse employment action even if plaintiff had not engaged in protected speech? If the plaintiff meets the burden of proof for the first three parts of this test, the burden shifts to the defendant to prove the fourth and fifth parts. Clairmont v. Sound Mental Health, 632 F.3d 1091, 1101–03 (9th Cir. 2011).

The analysis of causation in First Amendment retaliation cases may depend on the decision-making process and chain of command within an organization. If the defendant was a lower level manager and took adverse action against the plaintiff because of an unconstitutional motive to retaliate—but the defendant was not the final decision-maker for the adverse employment action—then there are more steps to the causation analysis. See Gilbrook v. City of Westminster, 177 F.3d 839, 854–55 (9th Cir. 1999). If the defendant (who was a subordinate manager with an unconstitutional motive) did not influence the upper level manager (the final decision-maker in the adverse employment decision against the plaintiff), then the defendant may under some circumstances be shielded from liability. This causation analysis is very fact-specific. Compare Ostad v. Oregon Health Sci. Univ., 327 F.3d 876 (9th Cir. 2003) (jury instructions and verdict for plaintiff upheld) with Lakeside-Scott v. Multnomah County, 556 F.3d 797, 803 (9th Cir. 2009).

2. Fourth Amendment.

Causation issues may be particularly complicated in cases in which the plaintiff alleges malicious prosecution or retaliatory arrest. See Hartman v. Moore, 547 U.S. 250, 259–66, 126 S.Ct. 1695, 164 L.Ed.2d 441 (2006); Beck v. City of Upland, 527 F.3d 853 (9th Cir. 2008). In such cases, the plaintiff is required to plead and prove the absence of probable cause. Beck v. City of Upland, 527 F.3d 853.

In cases in which the plaintiff alleges that he or she was arrested for communicating in a pointed manner with a police officer, the probable cause inquiry has First Amendment implications. Specific jury instructions may be required to explain the First and Fourth Amendment rights to freedom from being arrested for criticizing or expressing frustration with the law enforcement officer. Gulliford v. Pierce County, 136 F.3d 1345, 1349–50 (9th Cir. 1998); see City of Houston v. Hill, 482 U.S. 451, 459–67, 107 S.Ct. 2502, 96 L.Ed.2d 398 (1987).

If the plaintiff was apprehended by one officer who made the initial stop without probable cause, and then a second officer makes a custodial arrest believing the first officer's allegations that there was probable

cause, the first officer is not subject to qualified immunity nor can he or she rely on the fact that the second officer ultimately effectuated the arrest. See Whitley v. Warden, Wyoming St. Pen., 401 U.S. 560, 568–69, 91 S.Ct. 1031, 28 L.Ed.2d 306 (1971) (holding that "an otherwise illegal arrest cannot be insulated from challenge by the decision of the instigating officer to rely on fellow officers to make the arrest"); see also Deville v. Marcantel, 567 F.3d 156, 161–63, 165–67 (5th Cir. 2009) (the second officer to arrive at the scene reasonably believed he had probable cause and made a custodial arrest of the plaintiff, relying on information provided by the first officer at the scene; the court held that the second officer was covered by qualified immunity, but the first officer-who did not have sufficient information to establish probable cause-was not shielded by qualified immunity); see generally Osborne v. Seymour, 164 Wn.App. 820, 265 P.3d 917 (2011) (police officer's uncertainty about whether a civil standby entry and search was permitted did not justify a warrantless search of plaintiff's home).

3. Due process.

The causation instructions will depend on the specific due process challenge and the underlying right for which process is due. See generally, Gausvik v. Abbey, 126 Wn.App. 868, 885–87, 107 P.3d 98 (2005). For situations in which a due process issue may overlap with other constitutional claims, clarifying instructions can be given to guide the jury, so jurors can more clearly identify and match the particular acts or omissions claimed to have caused a particular injury and damage. Acevedo-Garcia v. Monroig, 351 F.3d 547, 567–71 (1st Cir. 2003).

4. Supervisor liability.

In Ashcroft v. Iqbal, 556 U.S. 662, 129 S.Ct. 1937, 1948–49, 173 L.Ed.2d 868 (2009), which was a *Bivens* cause of action rather than a Section 1983 case, the Court relied on the Section 1983 concept that respondeat superior liability cannot be imposed against a supervisor. The Court held that the individual supervisor cannot be liable simply because one of his or her subordinates violates the constitutional rights of a person. In a *Bivens* case, and by implication in a Section 1983 case, there would be no supervisor liability unless the supervisor directly caused a constitutional deprivation. Ashcroft v. Iqbal, 556 U.S. at 677.

The Ninth Circuit considered, in a Section 1983 case involving use of force and conditions of confinement at a jail, whether *Iqbal* changed the law regarding supervisor liability. Starr v. Baca, 652 F.3d 1202 (9th Cir.), opinion on denial of rehearing en banc, Starr v. County of Los Angeles, 659 F.3d 850 (9th Cir. 2011). The Ninth Circuit held that Section 1983 allows the jury to impose liability for an individual supervisor who indirectly causes a deprivation of constitutional rights by encouraging or directing acts to be committed or omitted by subordinate employees. The court determined that *Iqbal* did not change the law of

mens rea or causation for individual supervisory liability under Section 1983. Before and after *Iqbal,* the Ninth Circuit requires the plaintiff to produce evidence of an affirmative link between the supervisor's action, or inaction, and the constitutional deprivation. Starr v. Baca, 652 F.3d at 1205–08.

A supervisor causes the plaintiff to be subjected to a deprivation if he or she sets in motion a series of acts by others that result in a constitutional deprivation. Similarly, a supervisor causes the plaintiff to be subjected to a deprivation if he or she knowingly refuses to stop a series of acts by others, which the supervisor actually knows or objectively should know would cause others to inflict a constitutional injury. Starr v. Baca, 652 F.3d at 1207–08.

There is continuing debate on the issue of *indirect* causation for establishing individual liability of supervisors. See Lacey v. Maricopa County, 649 F.3d 1118 (9th Cir. 2011), rehearing en banc granted, 663 F.3d 1032 (9th Cir. 2011), opinion on rehearing en banc, 693 F.3d 896 (9th Cir. 2012); Comment, Supervisory Liability after *Iqbal*: Decoupling *Bivens* from Section 1983, 77 U. Chi. L. Rev. 1401, 1419–21, 1425–31 (2010) (analyzing *Iqbal*, discussing the federal circuit court opinions and different standards for *mens rea* and causation concerning supervisor liability, and suggesting that the statutory language "caused to be subjected" in Section 1983 implies that causation includes supervisory liability for *both* direct and indirect acts and omissions).

[Current as of September 2018.]

CHAPTER 341

CIVIL RIGHTS—MUNICIPAL AND LOCAL GOVERNMENT LIABILITY

WPI 341.01 Civil Rights—Municipal and Local Government Liability—General Introductory Instruction

WPI 341.02 Civil Rights—Municipal and Local Government Liability—Failure to Train, Supervise, or Instruct—Burden of Proof

WPI 341.03 Civil Rights—Municipal and Local Government Liability—Policy or Custom Inferred From Ratification of Conduct

WPI 341.04 Civil Rights—Failure to Train or Inadequate Training—Municipal Liability—"Deliberate Indifference"—Definition

WPI 341.01

CIVIL RIGHTS—MUNICIPAL AND LOCAL GOVERNMENT LIABILITY—GENERAL INTRODUCTORY INSTRUCTION

If a plaintiff is subjected to a deprivation of a constitutional right as a result of the official policy of a [city] [county], the [city] [county] is liable for injury or damage [proximately] caused by the deprivation if the official policy is a moving force that led to the deprivation.

"Official policy" means:

[(1)] [a rule or regulation promulgated, adopted, or ratified by the governmental entity's legislative body;]

[(2)] [a policy statement or decision that is officially made by the [city's] [county's] policy-making official;]

[(3)] [a custom or usage that is a permanent, widespread, well-settled practice that constitutes a standard operating procedure of the [city] [county];] [or]

[(4)] [an act or omission ratified by the [city's] [county's] policy-making official.] [(Name of person) is a policy-making official of (name of city or county).]

NOTE ON USE

Use this general instruction when a claim for civil rights liability is brought against a municipal or local government.

Select the appropriate bracketed phrases, depending upon the facts of the case. The bracketed phrases are selected definitions of official policy drawn from the cases cited in the Comment. Choose from among these phrases depending on the facts of the case, or draft other case-specific language. If paragraph (4) is being used, then include the paragraph's final sentence if the court has already ruled whether a particular individual was a policy-making official.

COMMENT

Policy maker. The determination of who is a final policy-maker is a legal issue to be determined by the court based on state and local law. See McMillian v. Monroe County, 520 U.S. 781, 785–93, 117 S.Ct. 1734, 138 L.Ed.2d 1 (1997); Jett v. Dallas Indep. Sch. Dist., 491 U.S. 701, 737–38, 109 S.Ct. 2702, 105 L.Ed.2d 598 (1989); City of St. Louis v. Praprotnik, 485 U.S. 112, 124, 108 S.Ct. 915, 99 L.Ed.2d 107 (1988) (plurality opinion). The instruction reflects the judge's role in deciding this issue. If factual issues exist, the jury might need to be instructed to find some of the facts.

Policy or custom. A municipality may be held liable for an official policy or informal custom, Monell v. Dept. of Soc. Servs., 436 U.S. 658, 690–94, 98 S.Ct. 2018, 56 L.Ed.2d 611 (1978), for acts or decisions of officials with final policy-making authority, Jett v. Dallas Indep. Sch. Dist., 491 U.S. at 723–31, 737, or for consciously ratifying the conduct of another, Gillette v. Delmore, 979 F.2d 1342, 1347 (9th Cir. 1992). See also Trevino v. Gates, 99 F.3d 911, 918 (9th Cir. 1996) (liability for an improper custom may not be predicated on isolated or sporadic incidents); Redman v. County of San Diego, 942 F.2d 1435, 1443–44 (9th Cir. 1991) (acquiescence in the repeated contravention of official written policy may itself constitute a custom or practice giving rise to liability).

Causation. Interpreting *Monell*, the Supreme Court in Bryan Co. Comm'rs v. Brown, 520 U.S. 397, 117 S.Ct. 1382, 137 L.Ed.2d 626 (1997), emphasized the need for plaintiff to demonstrate a direct causal link between the municipal action and the deprivation of federal rights, i.e., that the municipal action was the "moving force" behind the conduct that resulted in the deprivation. Bryan Co. Comm'rs v. Brown, 520 U.S. at 404. For further discussion of causation issues, see WPI 340.04 (Civil Rights—"Subjects" and "Causes to be Subjected"—Definition) and WPI 340.06 (Civil Rights—Causation—Comment Only).

Ratification. A jury may infer the existence of a policy or custom of a municipality if the municipality or its policy-makers ratify, by action or omission, the wrongful conduct of its employees after the fact. A ratification may occur when the policy-maker does not take remedial, disciplinary, or corrective action after the occurrence of the wrongful conduct. However, a policy-maker's inaction alone is not enough to establish ratification of an unconstitutional act. To prevail, the plaintiff must prove that the policy-maker made a deliberate choice from among various alternatives to follow a particular course of action. See the cases cited below.

"Policy or custom may be inferred if, after [constitutional violations] . . . officials took no steps to reprimand, or discharge the[ir subordinates], or if they otherwise failed to admit the [subordinates'] conduct was in error." Larez v. City of Los Angeles, 946 F.2d 630, 645 (9th Cir. 1991), quoting McRorie v. Shimoda, 795 F.2d 780, 784 (9th Cir. 1986).

To prevail on ratification grounds, the plaintiff must present evidence of "affirmative or deliberate conduct" on the part of the policymaker. Gillette v. Delmore, 979 F.2d 1342, 1349 (9th Cir. 1992). "If the authorized policymakers approve a subordinate's decision and the basis for it, their ratification would be chargeable to the municipality because their decision is final." City of St. Louis v. Praprotnik, 485 U.S. 112, 127, 108 S.Ct. 915, 99 L.Ed.2d 107 (1988) (plurality opinion); Miguel v. Guess, 112 Wn.App. 536, 546, 51 P.3d 89 (2002) (citing *Praprotnik*).

However, simply "going along with discretionary decisions made by one's subordinates . . . is not a delegation to them of the authority to make policy." The United States Supreme Court distinguished ratification of a policy statement by a subordinate official later expressly approved, or a series of decisions manifesting a " 'custom or usage' of which the supervisor must have been aware," both of which could indicate that the supervisor had adopted a policy "that happened to have been formulated or initiated by a lower-ranking official." . . . City of St. Louis v. Praprotnik, 485 U.S. at 129.

It may be helpful to define "ratified" for the jury by applying these holdings to the extent they apply to the facts of the case.

[Current as of September 2018.]

WPI 341.02

CIVIL RIGHTS—MUNICIPAL AND LOCAL GOVERNMENT LIABILITY—FAILURE TO TRAIN, SUPERVISE, OR INSTRUCT—BURDEN OF PROOF

On [his] [her] claim for failure to [train] [supervise] [instruct], (name of plaintiff) has the burden of proving each of the following propositions:

(1) That the [city] [county] did not adequately [train] [supervise] [instruct] its [officers] [employees] to properly handle the usual and recurring situations with which they must deal;

(2) That in failing to adequately [train] [supervise] [instruct], the [city] [county] was deliberately indifferent to the risk that an [untrained] [inadequately trained] [officer] [employee] would cause a deprivation of a right protected by the Constitution or laws of the United States;

(3) That the failure to provide proper [training] [supervision] [instruction] [caused] [is so closely related to the deprivation of the plaintiff's rights as to be [a] [the] moving force that caused] the deprivation of (name of plaintiff)'s rights protected by the Constitution or laws of the United States; and

(4) That (name of defendant)'s [actions] [failure to act] [proximately] caused injury or damage to (name of plaintiff).

If you find from your consideration of all the evidence that each of these propositions has been proved, your verdict should be for (name of plaintiff) [on this claim]. On the other hand, if any of these propositions has not been proved, your verdict should be for (name of defendant) [on this claim].

NOTE ON USE

When liability of a government entity is predicated upon an alleged failure to adequately train, supervise, or instruct employees, use this instruction along with WPI 341.01 (Civil Rights—Municipal and Local Government Liability—General Introductory Instruction) in an appropriate case.

Use this instruction with WPI 341.04 (Civil Rights—Failure to Train or Inadequate Training—Municipal Liability—"Deliberate Indifference"—Definition) and WPI 21.01 (Meaning of Burden of Proof—Preponderance of Evidence).

Regarding the bracketed word "proximately," see the detailed discussion of causation issues found in WPI 340.06 (Civil Rights—Causation—Comment Only). Instructions on causation must be carefully tailored to the specific case. See also WPI 340.04 (Civil Rights—"Subjects" and "Causes to be Subjected"—Definition), WPI 343.02 (Conditions of Confinement—Eighth Amendment—Deliberate Indifference—General Conditions of Confinement), and WPI 343.04, (Conditions of Confinement—Eighth Amendment—Deliberate Indifference—Medical), and the Notes on Use and Comments to these instructions.

Use the bracketed word "caused" when the plaintiff claims that the municipality's action or inaction directly caused the deprivation. Use the bracketed phrase "[a] [the] moving force that caused" when the plaintiff claims that the municipality's action or inaction indirectly caused the deprivation. See the Comment below regarding whether to use "a" or "the" with the "moving force" language.

COMMENT

This instruction was revised for this edition for clarity and to add the "moving force" standard of causation. City of Canton v. Harris, 489 U.S. 378, 387–390, 109 S.Ct. 1197, 103 L.Ed.2d 412 (1989). The Supreme Court has used the phrase "*the* moving force" in its holdings on this standard of causation. See, e.g., City of Canton v. Harris, 489 U.S. at 388–89; Connick v. Thompson, 563 U.S. 51, 59–61, 59 n.5, 131 S.Ct. 1350, 179 L.Ed.2d 417 (2011) (emphasis added). However, various circuit courts have approved "*a* moving force" language in jury instructions on this issue (emphasis added). Williams v. Paint Valley Local Sch. Dist., 400 F.3d 360, 369–70 (6th Cir. 2005); McGautha v. Jackson County, Mo., Collections Dept., 36 F.3d 53, 56–57 (8th Cir. 1994); Bordanaro v. McLeod, 871 F.2d 1151, 1165–66 (1st Cir. 1989).

The Tenth Circuit has approved the use of "*the* moving force" in a jury instruction on this issue (emphasis added). D.T. v. Independent Sch. Dist. No. 16, 894 F.2d 1176, 1185 (10th Cir. 1990). And in Castro v.

County of Los Angeles, 833 F.3d 1060, 1073–74 (9th Cir. 2016), cert. denied, 137 S.Ct. 831 (2017), the Ninth Circuit, sitting en banc, approved an instruction that required the plaintiff to prove that "the [entity defendants'] longstanding practice or custom caused harm to plaintiff." The instruction further provided that "[p]laintiff must establish an affirmative link between the practice or custom and the particular constitutional violation at issue."

In Mission Springs, Inc. v. City of Spokane, 134 Wn.2d 947, 967–68, 954 P.3d 250 (1998), the Washington Supreme Court cited with approval the moving force standard of causation and the definition of moving force adopted by the Ninth Circuit in Bateson v. Geisse, 857 F.2d 1300, 1303–04 (9th Cir. 1988). See also Sandoval v. Las Vegas Metropolitan Police Dept., 756 F.3d 1154, 1167–68 (9th Cir. 2014), cert. denied, 135 S.Ct. 1401 (2015) (to impose liability on a local government under § 1983, the plaintiff must prove that an action pursuant to official municipal policy caused the injury or that inadequate training or supervision was the moving force behind the deprivation).

Under the moving force standard, "the requisite causal connection can be established not only by some kind of direct personal participation in the deprivation but also by setting in motion a series of acts by others which the actor knows or reasonably should know would cause others to inflict constitutional injury." Mission Springs, Inc. v. City of Spokane, 134 Wn.2d 947, 967–68, 954 P.3d 250 (1998) (citations omitted). In an appropriate case, it may be helpful to provide this definition of moving force to the jury by modifying this instruction.

Liability exists "only where the failure to train amounts to deliberate indifference to the rights of persons with whom police come in contact." City of Canton v. Harris, 489 U.S. 378, 388, 109 S.Ct. 1197, 103 L.Ed.2d 412 (1989). Although similar, the analysis of a failure-to-train claim is distinct from the analysis of a claim alleging that the defendant failed to properly screen a job applicant (and the applicant, after being hired, allegedly caused a violation of the plaintiff's federal rights). Bryan Co. Comm'rs v. Brown, 520 U.S. 397, 409–15, 117 S.Ct. 1382, 137 L.Ed.2d 626 (1997); see also United States Court of Appeals for the Third Circuit, Model Civil Instruction 4.6.8 and Comment (2016 ed.).

A municipality's continuing failure to remedy known unconstitutional conduct of its employees is the type of informal policy or custom that is amenable to suit under Section 1983. See Monell v. Dept. of Soc. Servs., 436 U.S. 658, 690–91, 98 S.Ct. 2018, 56 L.Ed.2d 611 (1978). A policy or custom may be found in the failure of an official to take remedial steps after the alleged civil rights violations. Larez v. City of Los Angeles, 946 F.2d 630, 647 (9th Cir. 1991) (police chief would be liable if "it was almost impossible for a police officer to suffer discipline as a result of a complaint lodged by a citizen"); McRorie v. Shimoda, 795

F.2d 780, 784 (9th Cir. 1986) (custom inferred from failure to reprimand or discharge); Grandstaff v. City of Borger, 767 F.2d 161, 171 (5th Cir. 1985) (lack of reprimand or discharge of offending officers evidence of disposition of policymaker).

For a discussion of deliberate indifference, see the Comment to WPI 341.04 (Civil Rights—Failure to Train or Inadequate Training—Municipal Liability—"Deliberate Indifference"—Definition).

The Supreme Court has "left open the possibility that, 'in a narrow range of circumstances,' a pattern of similar violations might not be necessary to show deliberate indifference." Connick v. Thompson, 563 U.S. 51, 63–64, 131 S.Ct. 1350, 179 L.Ed.2d 417 (2011), quoting Board of Comm'rs of Bryan Cty. v. Brown, 520 U.S.397, 403, 117 S.Ct. 1382, 137 L.Ed. 2d 626 (1997). See also Flores v. County of Los Angeles, 758 F.3d 1154 (9th Cir. 2014). Several circuit courts of appeals have held that when the circumstances made it obvious that training was needed, that plaintiff was not required to establish a pattern of previous violations. See Gregory v. City of Louisville, 444 F.3d 725, 753–54 (6th Cir. 2006); Young v. City of Providence, 404 F.3d 4, 28–29 (1st Cir. 2005); Allen v. Muskogee, 119 F.3d 837, 844–45 (10th Cir. 1997); and Brown v. Bryan County, 219 F.3d 450, 458–65 (5th Cir. 2000). For a more detailed discussion, see the Comment to WPI 341.04 (Civil Rights—Failure to Train or Inadequate Training—Municipal Liability—"Deliberate Indifference"—Definition). In this regard, the instruction does not include language that requires a pattern of previous violations, with this issue being addressed in the "deliberate indifference" instruction, WPI 341.04.

For a discussion of causation issues, see the Comments to the following instructions: WPI 340.04 (Civil Rights—"Subjects" and "Causes to be Subjected"—Definition); WPI 340.06 (Civil Rights—Causation—Comment Only); and WPI 341.01 (Civil Rights—Municipal and Local Government Liability—General Introductory Instruction).

[Current as of September 2018.]

WPI 341.03

CIVIL RIGHTS—MUNICIPAL AND LOCAL GOVERNMENT LIABILITY—POLICY OR CUSTOM INFERRED FROM RATIFICATION OF CONDUCT

The WPI Committee recommends that ratification issues be addressed using WPI 341.01 (Civil Rights—Municipal and Local Government Liability).

COMMENT

For a discussion of ratification issues, see the Comment to WPI 341.01 (Civil Rights—Municipal and Local Government Liability).

[Current as of September 2018.]

WPI 341.04

CIVIL RIGHTS—FAILURE TO TRAIN OR INADEQUATE TRAINING—MUNICIPAL LIABILITY—"DELIBERATE INDIFFERENCE"—DEFINITION

"Deliberate indifference" is the disregard for a known or obvious consequence of one's acts or omissions. To establish deliberate indifference, (name of plaintiff) must prove that under the facts available to policymakers of (name of defendant) they knew or should have known that a [lack of training] [inadequate training] was substantially certain to result in a violation of the (specify the federal (constitutional) right at issue) rights protected by the Constitution or laws of the United States, of persons with whom the [untrained] [inadequately trained] employee comes into contact.

NOTE ON USE

Use this instruction with a municipal liability claim under a theory of failure to train, supervise, or instruct (WPI 341.02). This is a complex area of law, and trial courts must use caution in determining the precise jury instructions. See further discussion in the Comment below and the Comment to WPI 341.02 (Civil Rights—Municipal and Local Government Liability—Failure to Train, Supervise, or Instruct—Burden of Proof).

This deliberate indifference instruction is designed only for allegations of failure to train or inadequate training. Do not use this instruction in conditions of confinement cases involving claims of deliberate indifference to serious medical needs or failure to protect against serious harm of a non-medical nature.

For Eighth Amendment and Fourteenth Amendment claims against a person who, while working for a municipal or local government, has direct contact with inmates with regard to serious medical needs of prisoners, see WPI 343.00 (Introduction—Conditions of Confinement—Eighth Amendment and Fourteenth Amendment) for information on more specific instructions for that purpose. Likewise, for Eighth Amendment and Fourteenth Amendment claims against a person who, while working for a municipal or local government, has direct contact with inmates with regard to non-medical conditions of confinement, see WPI 343.00 regarding more specific instructions for "failure to protect" cases.

COMMENT

This instruction has been modified for this edition to reflect the objective standard of deliberate indifference applicable to claims against a municipality adopted by the Ninth Circuit in Castro v. County of Los Angeles, 833 F.3d 1060 (9th Cir. 2016) (en banc), cert. denied, 137 S.Ct. 831 (2017) (citing Farmer v. Brennan, 511 U.S. 825, 841, 114 S.Ct. 1970, 128 L.Ed.2d 811 (1994)).

To keep current on the United States Supreme Court case law, and interpretations of "deliberate indifference" and other Section 1983 jury instruction issues, practitioners should review pattern instructions from the United States Courts of Appeals. These instructions, Notes on Use, and Comments are found on the websites of the Courts of Appeals and in published reports from those courts.

Compared to the more direct route to municipal liability, a local government's culpability for deprivation of federal constitutional rights under Section 1983 "is at its most tenuous" when the claim alleges that a local governmental employee was not trained or was inadequately trained. Connick v. Thompson, 563 U.S. 51, 61, 131 S.Ct. 1350, 179 L.Ed.2d 417 (2011). "[D]eliberate indifference is a stringent standard of fault, requiring proof that a municipal actor disregarded a known or obvious consequence of his action." Bryan County Comm'rs v. Brown, 520 U.S. 397, 410, 117 S.Ct. 1382, 137 L.Ed.2d 626 (1997).

In Castro v. County of Los Angeles, 833 F.3d 1060, 1076 (9th Cir. 2016) (en banc), cert. denied, 137 S.Ct. 831 (2017), the Ninth Circuit held that the deliberate indifference inquiry is objective with respect to claims against a municipality, citing Farmer v. Brennan, 511 U.S. 825, 841, 114 S.Ct. 1970, 128 L.Ed.2d 811 (1994). The *Castro* objective standard is satisfied when "a § 1983 plaintiff can establish that the facts available to [government] policymakers put them on actual or constructive notice that the particular omission [or act] is substantially certain to result in the violation of the constitutional rights of their citizens." Castro v. County of Los Angeles, 833 F.3d at 1076 (quoting City of Canton v. Harris, 489 U.S. 378, 396, 109 S.Ct. 1197, 103 L.Ed.2d 412 (1989) (O'Connor, J., concurring in part and dissenting in part)) (emphasis omitted).

When a local government has a "policy of inaction" despite the fact that the local government is on notice that the untrained or inadequately trained employees cause such violations of constitutional rights, inaction "is the functional equivalent of a decision by the city itself to violate the Constitution." City of Canton v. Harris, 489 U.S. at 395 (O'Connor, J., concurring). In order for the plaintiff to establish that the defendant knew or should have known that a constitutional violation was highly predictable, a single incident of a constitutional violation—without

establishing a pattern—is normally not sufficient. Rather, evidence of a pattern of previous complaints, of incidents occurring before and similar to the plaintiff's current allegation against the municipal defendant, is normally required in order to show the "known or obvious" aspect of deliberate indifference. Connick v. Thompson, 563 U.S. 51, 61, 131 S.Ct. 1350, 179 L.Ed.2d 417 (2011).

Nevertheless, if it is obvious that employees such as the person who allegedly violated plaintiff's rights are routinely using weapons and instruments that could result in deadly force—or other relevant circumstances—and this makes it obvious there is an urgent need for a particular type of training in order to avoid violating the specific constitutional rights at issue, in the particular manner that occurred in the currently alleged violation, and that specific training is not given, then under such circumstances the plaintiff may rely on one incident without more of a pattern. Connick v. Thompson, 563 U.S. at 61–74.

Obvious gaps in training for certain high-risk areas of constitutional law—i.e., failing to teach employees a set of behaviors when it is highly predictable that not teaching those specific ways of doing the job will lead directly to a specific and extremely damaging or lethal constitutional violation—allow the plaintiff to rely on the single incident exception.

For example, in Gregory v. City of Louisville, 444 F.3d 725, 754–57 (6th Cir. 2006), the plaintiff alleged that the Louisville police department failed to train its officers in constitutionally permissible identification techniques. The police department relied on show-ups for victims to identify perpetrators, rather than using line-ups, and the plaintiff produced evidence of a "waiver" form that police routinely used to bypass the considerations for reliability set forth in Neil v. Biggers, 409 U.S. 188, 199–201, 93 S.Ct. 375, 34 L.Ed.2d 401 (1972); see also Foster v. California, 394 U.S. 440, 443, 89 S.Ct. 1127, 22 L.Ed.2d 401 (1969). Under these circumstances, the Sixth Circuit Court of Appeals held that:

> First, Plaintiff need not present evidence of a pattern of complaints consistent with his own if he presents evidence of a written policy unconstitutional on its face. The facts of this case show that the City's written line-up "waiver" form is direct evidence of a custom or practice, obviating the need for circumstantial evidence a court might otherwise seek. Second, Plaintiff need not present evidence of other complaints if he can show that the City failed to train its officers in proper identification techniques, and that such failure to train had the "obvious consequences" of leading to constitutional violations of the sort experienced by Plaintiff.

Gregory v. City of Louisville, 444 F.3d at 755 (internal citations omitted).

Thus, in *Gregory,* the court held that because the plaintiff had evidence showing there was a lack of training in a police skill that was crucial to ensure reliable identification, there was, under the *City of Canton* standard for municipal liability, an obvious gap in training and the obvious and extreme constitutional consequences flowing from that gap. Therefore, a single incident was sufficient to present a question of fact for the jury and summary judgment was denied. See also, Young v. City of Providence, 404 F.3d 4, 28–29 (1st Cir. 2005) (failure to train police officers regarding friendly-fire shootings); Allen v. Muskogee, 119 F.3d 837, 844–45 (10th Cir. 1997) (failure to train police officers regarding how to handle an emotionally disturbed, suicidal person who is carrying a gun).

In Brown v. Bryan County, 219 F.3d 450, 458–65 (5th Cir.) (following remand from U.S. Supreme Court, in Bryan County Comm'rs v. Brown, 520 U.S. 397, 117 S.Ct. 1382, 137 L.Ed.2d 626 (1997)), the Fifth Circuit upheld a jury instruction that provided:

> [The sheriff] would have acted with deliberate indifference in adopting an otherwise constitutional training policy if in light of the duties assigned to [the deputy sheriff] the need for more or different training was so obvious and the inadequacy so likely to result in violations of constitutional rights, that [the sheriff] can be reasonably said to have been deliberately indifferent to the constitutional needs of the Plaintiff.

Brown v. Bryan County, 219 F.3d at 462 n.12. In the *Brown* case, the plaintiff alleged that the county failed to train a specific sheriff's deputy about how to handle situations of fleeing suspects, and that this was evidence of a county policy. The court upheld the jury's verdict as to both deliberate indifference and causation, despite the fact that there was no previous pattern of violations, because a single incident of injuring a citizen during a car chase was sufficient under the "obviousness" standard of *City of Canton.*

[Current as of September 2018.]

CHAPTER 342

CIVIL RIGHTS—FOURTH AMENDMENT—UNREASONABLE SEARCH AND SEIZURE

WPI 342.01 Unreasonable Force—Fourth Amendment—Burden of Proof on the Issues

WPI 342.02 Definition of "Seizure" of a Person—Fourth Amendment

WPI 342.03 Definition of Unreasonable Force—Fourth Amendment

WPI 342.04 Unreasonable Search—Burden of Proof on the Issues

WPI 342.05 Unreasonable Search—Exceptions to Warrant Requirement—Search Incident to Lawful Arrest

WPI 342.06 Unreasonable Search—Exceptions to Warrant Requirement—Consent

WPI 342.07 Unreasonable Search—Exceptions to Warrant Requirement—Exigent Circumstances

WPI 342.08 Unlawful Arrest/Seizure of Person—Fourth Amendment—Exception to Warrant Requirement—Probable Cause to Believe Crime Committed

WPI 342.09 Unlawful Arrest/Seizure of Person—Fourth Amendment—Exception to Warrant Requirement—Probable Cause—Considerations

WPI 342.10 Unlawful Seizure of Person—Fourth Amendment—Exception to Warrant Requirement—Reasonable Suspicion for Investigatory Stop

WPI 342.01

UNREASONABLE FORCE—FOURTH AMENDMENT—BURDEN OF PROOF ON THE ISSUES

(Insert name of plaintiff) **claims that** (name of defendant) **subjected** (name of plaintiff) **to the deprivation of [his] [her] Fourth Amendment rights by [arresting] [seizing] [him] [her] with unreasonable force.**

(Name of plaintiff) **has the burden of proving each of the following propositions:**

(1) That (name of defendant) **arrested [or seized]** (name of plaintiff) **under color of law;**

(2) That the force used to effect the arrest [or seizure] was unreasonable under the circumstances; and

(3) That (name of defendant's) **actions [proximately] caused injury or damage to** (name of plaintiff).

If you find from your consideration of all the evidence that each of these propositions has been proved, then your verdict should be for (name of plaintiff) **[on this claim]. On the other hand, if any of these propositions has not been proved, then your verdict should be for** (name of defendant) **[on this claim].**

NOTE ON USE

Use this instruction when it is claimed that plaintiff's Fourth Amendment rights were violated by an unreasonable use of force in the arrest or seizure of the plaintiff. For cases in which the defendant did not directly arrest the plaintiff, but instead caused the plaintiff to be arrested, the instruction will need to be modified accordingly.

Use this instruction with WPI 340.01 (Claims Instruction for Section 1983 Cases) and WPI 340.03 (Civil Rights—"Under Color of Law"—Definition). Use this instruction in place of WPI 340.02 (Civil Rights—Individual Defendant—Burden of Proof on the Issues).

Regarding the bracketed word "proximately," see the detailed discussion of causation issues found in WPI 340.06 (Civil Rights—Causation—Comment Only). Instructions on causation must be carefully tailored to the specific case. See also WPI 340.02 (Civil Rights—Individual Defendant—Burden of Proof on the Issues) and 340.04 (Civil Rights—"Subjects" and "Causes to be Subjected"—Definition) and the Notes on Use and Comments to these instructions.

Use the bracketed phrases as appropriate. When a seizure, other than an arrest, is an issue in the case, include the term and combine this instruction with WPI 342.02 (Definition of "Seizure" of a Person—Fourth Amendment).

COMMENT

This instruction uses the term "deprivation" in the first paragraph,

rather than referring to a constitutional violation, in order to be consistent with the phraseology of WPI 340.01 (Claims Instruction for Section 1983 Cases) and WPI 340.02 (Civil Rights—Individual Defendant—Burden of Proof on the Issues).

A claim of violation of constitutional rights by the application of unreasonable force states a claim under the Fourth Amendment if the unreasonable force is applied when the plaintiff is free from incarceration or custody and the plaintiff is being arrested, stopped, or apprehended with or through the use of the force. Graham v. Connor, 490 U.S. 386, 109 S.Ct. 1865, 104 L.Ed.2d 443 (1989). Note that different proof requirements exist for an incarcerated plaintiff's claim of cruel and unusual punishment under the Eighth Amendment. E.g., Whitley v. Albers, 475 U.S. 312, 318–26, 106 S.Ct. 1078, 89 L.Ed.2d 251 (1986).

The key issue is unreasonableness in the circumstances of the force used, which is analyzed separately from any alleged unreasonableness in the basis for an arrest or apprehension. See Tennessee v. Garner, 471 U.S. 1, 105 S.Ct. 1694, 85 L.Ed.2d 1 (1985) (deadly force to apprehend apparently unarmed and fleeing suspect may violate constitutional rights despite probable cause for arrest).

The force must be objectively unreasonable under the circumstances in order to comprise a deprivation. Graham v. Connor, 490 U.S. 386, 396, 109 S.Ct. 1865, 104 L.Ed.2d 443 (1989).

In Brewer v. City of Napa, 210 F.3d 1093, 1097 (9th Cir. 2000), the court discussed the appropriateness of the instruction focusing on the totality of the circumstances, rather than a list of particular factors, and approved a totality of the circumstances instruction on the facts of that case. See also Robinson v. Solano County, 278 F.3d 1007, 1013–14 (9th Cir. 2002) (citing *Graham*); Staats v. Brown, 139 Wn.2d 757, 774, 991 P.2d 615 (2000).

[Current as of September 2018.]

WPI 342.02

DEFINITION OF "SEIZURE" OF A PERSON—FOURTH AMENDMENT

A "seizure" of a person under the Fourth Amendment occurs when a police officer has in some way restrained the liberty of a person by means of physical force or a show of authority.

NOTE ON USE

Use this instruction with WPI 342.01 (Unreasonable Force—Fourth Amendment—Burden of Proof on the Issues) in Fourth Amendment cases when a seizure of a person is an element of the cause of action, and an issue other than arrest is involved.

COMMENT

The court in Tennessee v. Garner, 471 U.S. 1, 7, 105 S.Ct. 1694, 85 L.Ed.2d 1 (1985) (seizure by fatal gunshot) held that "whenever an officer restrains the freedom of a person to walk away, he has seized that person." See also Graham v. Connor, 490 U.S. 386, 395 n.10, 109 S.Ct. 1865, 104 L.Ed.2d 443 (1989) (seizure by means of physical force or show of authority that in some way restrains the liberty of a citizen, e.g., during an investigatory stop); United States v. Faulkner, 450 F.3d 466, 469 (9th Cir. 2006) (". . . a person has been 'seized' within the meaning of the Fourth Amendment only if, in view of all the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave"). A seizure may be effected where a person is not free to terminate an encounter with a police officer. See Florida v. Bostick, 501 U.S. 429, 436, 111 S.Ct. 2382, 115 L.Ed.2d 389 (1991) (a passenger on a bus is not free to leave the bus; the question is whether he feels free to terminate the police encounter).

In an appropriate case, it may be necessary to amend the instruction to address the extent to which the actions of government officials were intentional. "Violation of the Fourth Amendment requires an intentional acquisition of physical control. A seizure occurs even when an unintended person or thing is the object of the detention or taking . . . but the detention or taking itself must be willful." Brower v. County of Inyo, 489 U.S. 593, 595, 109 S.Ct. 1378, 103 L.Ed.2d 628 (1989) (citations omitted) (intentional stopping of fleeing suspect by roadblock constituted "seizure").

[Current as of September 2018.]

WPI 342.03

DEFINITION OF UNREASONABLE FORCE—FOURTH AMENDMENT

A seizure of a person is unreasonable under the Fourth Amendment if [a police officer] [(name of other person acting under color of state law)**] uses excessive force [in making a lawful arrest] [and] [or] [in defending [himself] [herself] [others]]. Thus, in order to prove an unreasonable seizure in this case, the plaintiff must prove by a preponderance of the evidence that the officer[s] used excessive force when** (insert factual basis of the claim).

Under the Fourth Amendment, a police officer may only use such force as is objectively reasonable under all of the circumstances. In other words, you must judge the reasonableness of a particular use of force from the perspective of a reasonable officer on the scene and not with the 20/20 vision of hindsight.

In determining whether (name of officer(s)) **used excessive force in this case, consider all of the circumstances known to the officer[s] on the scene [including but not limited to:**

(a) severity of the crime;

(b) circumstances to which the officer was responding;

(c) whether (name of plaintiff) **reasonably appeared to pose an immediate threat to** (name of defendant) **or others;**

(d) whether (name of plaintiff) **actively resisted [arrest] [detention];**

(e) whether (name of plaintiff) **attempted to evade [arrest] [detention];**

(f) the amount of time available to (name of defendant) **at**

the time [he] [she] made the decision whether to use force, and what type and degree of force was necessary;

(g) whether there was a change of circumstance during which (name of defendant) **had to make a decision about the type and amount of force that appeared to be necessary;**

(h) whether alternative methods of using force for [arrest] [detention] were available to (name of defendant) **at that time; and**

(i) whether the officer issued a warning to the suspect, if feasible].

NOTE ON USE

Use this instruction with WPI 342.01 (Unreasonable Force—Fourth Amendment—Burden of Proof on the Issues) and WPI 340.01 (Claims Instruction for Section 1983 Cases) if the case involves an unreasonable force claim under the Fourth Amendment. Do not use this instruction if the claim is excessive use of force involving a plaintiff who is incarcerated pursuant to a judgment and sentence. See the Comment to WPI 342.01 (Unreasonable Force—Fourth Amendment—Burden of Proof on the Issues). For excessive force claims that involve persons who are in custody, serving a sentence after being convicted of a crime, see WPI 343.08 (Conditions of Confinement—Eighth Amendment—Excessive Force—Burden of Proof on the Issues).

The court may include a reference to factors that reflect relevant circumstances, presented here in brackets, if the specific factor is supported by substantial evidence at trial.

As the majority of unreasonable force cases involve police officers, the language of the jury instruction refers to police officers; the instruction will need to be modified appropriately if the defendant or defendants are other individuals acting under color of state law.

See the Comment for discussion of the following issues: excessive force claims concerning persons who have been arrested, but not yet charged with a crime; excessive force claims concerning persons who have been charged with a crime, but have not yet been sentenced; claims concerning bystanders affected by police conduct during someone else's arrest or seizure.

COMMENT

This instruction has been revised for this edition. Subsection (i) has been added to the instruction. See Tennessee v. Garner, 471 U.S. 1, 11–12, 105 S.Ct. 1694, 85 L.Ed.2d 1 (1985).

General background. This instruction is based on Scott v. Harris, 550 U.S. 372, 127 S.Ct. 1769, 167 L.Ed.2d 686 (2007), Graham v. Connor, 490 U.S. 386, 396–97, 109 S.Ct. 1865, 104 L.Ed.2d 443 (1989), and Tennessee v. Garner, 471 U.S. 1, 11–12, 105 S.Ct. 1694, 85 L.Ed.2d 1 (1985). See generally Luchtel v. Hagemann, 623 F.3d 975, 980–83 (9th Cir. 2010) (examining factors and deciding as a matter of law that force was reasonable). The factors in the instruction above are similar to those described in the Ninth Circuit Model Civil Jury Instruction 9.22 (2007).

With regard to avoiding comments on the evidence, see the Comment to WPI 340.01 (Claims Instruction for Section 1983 Cases).

In *Graham*, the U.S. Supreme Court concluded that the test of reasonableness in the use of force or threat of force to arrest or stop is "not capable of precise definition or mechanical application," and therefore:

> its proper application requires careful attention to the facts and circumstances of each particular case, including the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officers or others, or whether he is actively resisting arrest or attempting to evade arrest by flight . . .
>
> The "reasonableness" of a particular use of force must be judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight . . . The calculus of reasonableness must embody allowance for the fact that police officers are often forced to make split-second judgments—in circumstances that are tense, uncertain, and rapidly evolving—in a particular situation.

Graham v. Connor, 490 U.S. 386, 396, 109 S.Ct. 1865, 104 L.Ed.2d 443 (1989) (citations omitted).

The balancing test is the same when police use deadly force. Scott v. Harris, 550 U.S. 372, 382–83,127 S.Ct. 1769, 167 L.Ed.2d 686 (2007); Tennessee v. Garner, 471 U.S. 1, 3, 105 S.Ct. 1694, 85 L.Ed.2d 1 (1985); see also, Estate of Lee v. City of Spokane, 101 Wn.App. 158, 163–70, 2 P.3d 979 (2000).

In Brewer v. City of Napa, 210 F.3d 1093, 1097 (9th Cir. 2000), the

court discussed the appropriateness of the instruction focusing on the totality of the circumstances, rather than a list of particular factors. See also Robinson v. Solano County, 278 F.3d 1007 (9th Cir. 2002) (citing *Graham*).

Persons who have been arrested, but not yet charged—Persons who have been charged but not yet subject to judgment and sentence—Fourth and Fourteenth Amendment standards. There is considerable debate about the analysis for use-of-force claims involving a person in custody after arrest but before any judgment and sentence are entered. See Graham v. Connor, 490 U.S. at 395 n.10; see also County of Riverside v. McLaughlin, 500 U.S. 44, 52–57, 111 S.Ct. 1661, 114 L.Ed.2d 49 (1991); City of Revere v. Mass. Gen'l Hosp., 463 U.S. 239, 243–44, 103 S.Ct. 2979, 77 L.Ed.2d 605 (1983); Bell v. Wolfish, 441 U.S. 520, 535–39, 99 S.Ct. 1861, 60 L.Ed.2d 447 (1979); Gerstein v. Pugh, 420 U.S. 103, 111–26, 95 S.Ct. 854, 43 L.Ed.2d 54 (1975). The Supreme Court addressed unlawful pretrial detention claims in Manuel v. City of Joliet, __ U.S. __, 137 S.Ct. 911, 197 L.Ed.2d 312 (2017), and determined that the Fourth Amendment governs unlawful pretrial detention claims, but did not address unconstitutional use of force.

In Pierce v. Multnomah County, 76 F.3d 1032, 1042 (9th Cir. 1996), the court relied on the Fourth Amendment to analyze a use-of-force claim regarding a pretrial detainee. In Demery v. Arpaio, 378 F.3d 1020, 1029 (9th Cir. 2004), the court relied on the Fourteenth Amendment to analyze a conditions of confinement claim regarding pretrial detainees. See also White v. Roper, 901 F.2d 1501, 1506–07 (9th Cir. 1990) (recognizing the different approaches under the Fourth and Fourteenth Amendments). For a detailed discussion of the different standards, see Comment, The Antithetical Definition of Personal Seizure: Filling the Supreme Court Gap in Analyzing Section 1983 Excessive-Force Claims Arising After Arrest and Before Pretrial Detention, 59 Cath. U. L. Rev. 493 (2010); Note, Judicial Illumination of the Constitutional "Twilight Zone": Protecting Post-Arrest Pretrial Suspects from Excessive Force at the Hands of Law Enforcement, 44 Boston C. L. Rev. 1351 (2003).

Bystanders. For Section 1983 claims by bystander plaintiffs, who are neither seized by police nor in custody, if the alleged harm occurred while police were in hot pursuit of a suspect, the Fourteenth Amendment applies and the standard is the same as in Whitley v. Albers, 475 U.S. 312, 320–21, 106 S.Ct. 1078, 89 L.Ed.2d 251 (1986). The test for reasonableness of force in such circumstances is whether the challenged governmental action is "so egregious, so outrageous, that it may fairly be said to shock the contemporary conscience," and "whether force was applied in a good faith effort [to subdue a suspect] or [was used] maliciously and sadistically for the very purpose of causing harm." County of Sacramento v. Lewis, 523 U.S. 833, 847 n.8, 853, 118 S.Ct. 1708, 140 L.Ed.2d 1043 (1998); see generally Rochin v. California, 342 U.S. 165, 72 S.Ct. 205, 96 L.Ed.2d 183 (1952).

When the claim involves a bystander inadvertently stung by police using pepper spray to subdue a crowd, this Fourteenth Amendment standard has been used. Logan v. City of Pullman, 392 F.Supp.2d 1246, 1263–65 (E.D. Wash. 2005). However, if a potential suspect is affected by pepper spray, the use of that chemical device may itself constitute a seizure and trigger the Fourth Amendment use-of-force standard. See State v. Garcia, 147 N.M. 134, 140–42, 217 P.3d 1032 (2009) (examining the question of whether effect of pepper spray on suspect constituted a seizure under California v. Hodari D., 499 U.S. 621, 626, 111 S.Ct. 1547, 113 L.Ed.2d 690 (1991)); see also Nelson v. City of Davis, 709 F.Supp.2d 978, 987–90 (E.D. Cal. 2010), affirmed, 685 F.3d 867 (9th Cir. 2012) (police used pepper ball launcher to lob pepper spray at group of party-goers in an attempt to quell a large and violent crowd; a pepper spray ball hit plaintiff in the eye; the court determined that plaintiff was probably among a sub-group in a particular location specifically targeted by police; because the facts alleged in summary judgment documents showed plaintiff was within a group identified as potential suspects, there was a genuine question of material fact for the jury—whether plaintiff was seized by use of the pepper ball on that group; the court analyzed use of force, and the issue of qualified immunity, under the Fourth Amendment standard).

[Current as of September 2018.]

WPI 342.04

UNREASONABLE SEARCH—BURDEN OF PROOF ON THE ISSUES

(Name of plaintiff) **claims that** (name of defendant) **subjected** (name of plaintiff) **to a deprivation of [his] [her] Fourth Amendment constitutional right to be free from an unreasonable search.**

(Name of plaintiff) **has the burden of proving each of the following propositions:**

(1) That (name of defendant), **acting under color of law, searched [the person of] [the property of]** (name of plaintiff);

(2) That the search was unreasonable; and

(3) That (name of defendant)'s **actions [proximately] caused injury or damage to** (name of plaintiff).

If you find from your consideration of all the evidence that each of these propositions has been proved, then your verdict should be for (name of plaintiff) **[on this claim]. On the other hand, if any of these propositions has not been proved, then your verdict should be for** (name of defendant) **[on this claim].**

NOTE ON USE

Use this instruction for Fourth Amendment claims involving unreasonable searches. For cases in which the defendant did not directly search the plaintiff, but instead caused the plaintiff to be searched, the instruction will need to be modified.

Use this instruction with WPI 340.01 (Claims Instruction for Section 1983 Cases) and WPI 340.03 (Civil Rights—"Under Color of Law"—Definition). Use this instruction in place of WPI 340.02 (Civil Rights—Individual Defendant—Burden of Proof on the Issues).

Depending on the facts, the instruction may need to be accompanied

by one of the pattern instructions addressing exceptions from the need for a search warrant. See WPI 342.05 (search incident to lawful arrest); WPI 342.06 (consent); and WPI 342.07 (exigent circumstances).

Regarding the bracketed word "proximately," see the detailed discussion of causation, in WPI 340.06 (Causation—Comment Only); see also the Comments to WPI 340.02 (Civil Rights—Individual Defendant—Burden of Proof on the Issues) and WPI 340.04 (Civil Rights—"Subjects" and "Causes to be Subjected"—Definition).

Use this instruction with WPI 21.01 (Meaning of Burden of Proof—Preponderance of Evidence).

COMMENT

The instruction is similar to Ninth Circuit Model Civil Jury Instruction 9.12 (2007). For discussion, see WPI 340.06 (Causation—Comment Only).

For search cases filed under Section 1983, the essential element in the plaintiff's burden of proof is that the search was unreasonable. See Ruggiero v. Krzeminski, 928 F.2d 558, 562–63 (2d Cir.1991).

Under the Fourth Amendment, a search occurs if the government intrudes upon a subjective and reasonable expectation of privacy. Katz v. United States, 389 U.S. 347, 351–52, 88 S.Ct. 507, 19 L.Ed.2d 576 (1967); State v. Young, 123 Wn.2d 173, 181, 867 P.2d 593 (1994). A search also occurs when the government physically intrudes on persons, houses, papers, or effects. See Florida v. Jardines, 569 U.S. 1, 133 S.Ct 1409, 1414–18, 185 L.Ed.2d 495 (2013) (using a drug dog to investigate within the curtilage of a home comprised a search); United States v. Jones, 565 U.S. 400, 404–11, 132 S.Ct. 945, 949–53, 181 L.Ed.2d 911 (2012) (holding that a search occurred when the government physically occupied private space in order to obtain information).

Courts continue to grapple with emerging technology in defining what governmental actions comprise a search. In United States v. Jones, 565 U.S. 400, 404, 132 S.Ct. 945, 949, 181 L.Ed.2d 911 (2012), the Supreme Court held that a person had been searched within the meaning of the Fourth Amendment where police had attached a GPS device to his car in order to track his movements for more than a month. See also Riley v. California, 573 U.S. 373, 124 S.Ct. 2473, 189 L.Ed. 2d 430 (2014).

Parties and courts should take care when drafting jury instructions that when the federal constitution forms the basis for a claim, those instructions draw on cases that interpret the federal constitution, as the Washington Supreme Court has determined that Article I, section 7 of the state constitution provides individuals with broader protections

than required under the Fourth Amendment. See WPI 340.00 (Civil Rights—Introduction).

Warrantless searches are presumptively unreasonable. Arizona v. Gant, 556 U.S. 332, 351, 129 S.Ct. 1710, 173 L.Ed.2d 485 (2009); State v. Acrey, 148 Wn.2d 738, 745–46, 64 P.3d 594 (2003). Such searches are permitted only when a few "specifically established and jealously guarded exceptions are present, the burden to establish same falling upon the party who conducted the warrantless search." Staats v. Brown, 139 Wn.2d 757, 776, 991 P.2d 615 (2000). In warrantless search cases, the presumption of unreasonableness:

> cannot serve to place on the defendant the burden of proving that the official action was reasonable. Rather, the presumption may cast upon the defendant the duty of producing evidence of consent or search incident to arrest or other exceptions to the warrant requirement. However, the ultimate risk of nonpersuasion must remain squarely on the plaintiff in accordance with established principles governing civil trials.

Ruggiero v. Krzeminski, 928 F.2d 558, 563 (2d Cir. 1991).

A search warrant may issue only upon a determination of probable cause. State v. Thein, 138 Wn.2d 133, 140, 977 P.2d 582 (1999). Probable cause exists when the facts and circumstances support a reasonable inference that, more probably than not, a crime has occurred or is occurring and that particular evidence of that crime is likely to be found at the place to be searched. See State v. Thein, 138 Wn.2d. at 140; State v. Goble, 88 Wn.App. 503, 508–09, 945 P.2d 263 (1997); State v. Werth, 18 Wn.App. 530, 536, 571 P.2d 941 (1977).

Search warrants must be strictly construed and their execution must be within the specificity of the warrant. State v. Cottrell, 12 Wn.App. 640, 643, 532 P.2d 644 (1975), reversed on other grounds, 86 Wn.2d 130, 542 P.2d 771 (1975). Once the purpose of the warrant has been carried out, the authority to search ends. See State v. Legas, 20 Wn.App. 535, 541, 581 P.2d 172 (1978).

In certain settings, such as schools, airports, courthouses, and federal buildings, warrantless searches are authorized. See, e.g., United States v. Bulacan, 156 F.3d 963, 967 (9th Cir.1998) (administrative searches at federal buildings for weapons and explosives must be limited in intrusiveness, consistent with administrative scheme); Kuehn v. Renton Sch. Dist, 103 Wn.2d 594, 599, 694 P.2d 1078 (1985) (search by school officials must be based on particularized suspicion with respect to each individual searched); Jacobsen v. City of Seattle, 98 Wn.2d 668, 673, 658 P.2d 653 (1983) (citing cases related to airports and courthouses); State v. McKinnon, 88 Wn.2d 75, 558 P.2d 781 (1977) (lower quantum of evidence required for search of students by school officials).

In a Section 1983 case, the Washington Supreme Court rejected as unconstitutional intensive pat-down searches of persons attending rock concerts. Jacobsen v. City of Seattle, 98 Wn.2d 668, 658 P.2d 653 (1983).

[Current as of September 2018.]

WPI 342.05

UNREASONABLE SEARCH—EXCEPTIONS TO WARRANT REQUIREMENT—SEARCH INCIDENT TO LAWFUL ARREST

A search is reasonable, and a search warrant is not required, if the search is incident to a lawful arrest. [The court has decided in a pre-trial legal ruling that the arrest in this case was lawful.]

An arresting officer may search the person arrested and the immediate area within which that person might gain possession of a weapon or might destroy or hide evidence. This search must be contemporaneous with the arrest.

NOTE ON USE

Use this instruction for a claim of an unreasonable search under the Fourth Amendment when the issues involve a search incident to arrest.

Use this instruction with WPI 342.04 (Unreasonable Search—Burden of Proof on the Issues) and WPI 340.01 (Claims Instruction for Section 1983 Cases).

This instruction is not intended to be a complete statement of the law for all cases. Additional instructions as to the permissible scope of the search may well be needed based on the particular facts of the case. If the judge has not made a legal ruling that the arrest was lawful, the judge will need to craft an instruction that sets forth the permissible scope of the search incident to lawful arrest and that allows the jury to address material questions of fact. See the Comment below concerning the scope of search incident to arrest and the evolving court opinions in this area.

COMMENT

The Ninth Circuit instruction on general searches incident to arrest is Ninth Circuit Civil Model Jury Instruction 9.13 (2007). The Ninth Circuit has approved a separate instruction for searches of vehicles incident to the arrest of a recent occupant. 9th Cir. Civ. Jury Instr. 9.14 (2007).

Use of instruction. Because the instruction is not a complete statement of the law for all factual contexts, additional instructions often will be required to inform jurors about the permissible scope of the search. These instructions will vary depending on the area being searched. For cases involving vehicle searches, additional instructions can be drafted based on Arizona v. Gant, 556 U.S. 332, 129 S.Ct. 1716, 173 L.Ed.2d 485 (2009), and related opinions. For building searches, additional instructions can be drafted based on State v. Hopkins, 113 Wn.App. 954, 55 P.3d 691 (2002), and related opinions. The law as to the permissible scope of a search continues to evolve; practitioners are encouraged to review the most recent appellate opinions.

The Supreme Court has clarified that police officers are not allowed to search the inside of a vehicle under the search incident to arrest rule, if the person is arrested in a vehicle, and is immobilized so that he or she cannot gain access to weapons or evidence of the specific crime for which the arrest is made; or if the person being arrested in the vehicle is removed or escapes from the vehicle and goes to a place where he or she cannot gain access to the vehicle to obtain weapons or evidence of the specific crime for which the arrest is made. Under the Fourth Amendment, officers may search the car either if the arrestee is not secured or if they have a reasonable belief that evidence of the offense of arrest may be found in the vehicle. Arizona v. Gant, 556 U.S. 332, 351, 129 S.Ct. 1716, 173 L.Ed.2d 485 (2009); see also State v. Robinson, 171 Wn.2d 292, 301, 253 P.3d 84 (2011) (quoting *Gant*).

Pre-*Gant* case law concerning search incident to arrest must be re-evaluated in light of the new rule established in *Gant*. Because much of Washington case law regarding vehicle searches relies on article I, section 7 of the Washington Constitution, particular care must be taken when relying on Washington state cases. State v. Valdez, 167 Wn.2d 761, 224 P.3d 751 (2009).

Area searched. When a lawful arrest is made, it is reasonable for a police officer to search the person arrested and the area "within [the arrestee's] immediate control," i.e., "the area from within which [the arrestee] might gain possession of a weapon or destructible evidence." Chimel v. California, 395 U.S. 752, 763, 89 S.Ct. 2034, 23 L.Ed.2d 685 (1969); Arizona v. Gant, 556 U.S. 332, 351, 129 S.Ct. 1716, 1723–24, 173 L.Ed.2d 485 (2009).

Unlawful arrest. If the arrest was unlawful or invalid, then the search incident to arrest is invalid. State v. Hehman, 90 Wn.2d 45, 50, 578 P.2d 527 (1978). In *Hehman,* the Washington Supreme Court held that a custodial arrest is not permissible, under Washington law, for minor traffic offenses as long as the defendant signs the promise to appear under RCW 46.64.015. The United States Supreme Court, however,

held in Virginia v. Moore, 553 U.S. 164, 128 S.Ct. 1598, 170 L.Ed.2d 559 (2008), that even if state law forbids a custodial arrest for certain types of offenses, an arrest that is invalid under state rules may still be found reasonable and lawful under the Fourth Amendment in a Section 1983 lawsuit. Warrantless arrests for misdemeanors committed in the presence of an arresting officer are reasonable under the Fourth Amendment. Virginia v. Moore, 553 U.S. 164; see also Whren v. United States, 517 U.S. 806, 815, 116 S.Ct. 1769, 135 L.Ed.2d 89 (1996).

A search is not reasonable under the exception if it is conducted after law enforcement officers have determined that the person will not be detained. State v. Carner, 28 Wn.App. 439, 444–45, 624 P.2d 204 (1981).

Misdemeanors. For misdemeanor crimes in general, the Washington Supreme Court has also held that the Fourth Amendment does not require that a misdemeanor be committed "in the presence" of a police officer in order to justify a custodial arrest. State v. Walker, 157 Wn.2d 307, 319–22, 138 P.3d 113 (2006). If, however, a suspect passively fails to provide information, or fails to provide identification, the suspect's failure to do so does not justify a custodial arrest for obstructing an officer. Staats v. Brown, 139 Wn.2d 757, 764–71, 991 P.2d 615 (2000); see also WPI 120.02 (Obstructing a Law Enforcement Officer—Elements); but see Virginia v. Moore, 553 U.S. 164, 128 S.Ct. 1598, 170 L.Ed.2d 559 (2008).

"Within the control." An object is considered to be "within the control of" the arrestee if the object was within the arrestee's reach immediately prior to, or at the moment of, the arrest. State v. Smith, 119 Wn.2d 675, 681–82, 835 P.2d 1025 (1992). Under the exception for searches incident to arrest, officers may conduct a "protective sweep" of the premises where the arrest was made, if the search is based on specific facts that support a reasonable belief that the area swept may harbor an individual who poses danger to the officers or others. Maryland v. Buie, 494 U.S. 325, 327, 110 S.Ct. 1093, 108 L.Ed.2d 276 (1990); State v. Hopkins, 113 Wn.App. 954, 959, 55 P.3d 691 (2002).

Personal property searchable incident to arrest. Searches incident to arrest may extend to items immediately associated with the arrestee at the time of arrest. See State v. Brock, 184 Wn.2d 148, 159, 355 P.3d 1118 (2015) (search of backpack reasonable where arrestee had been wearing backpack at time of initial stop prior to arrest); State v. MacDicken, 179 Wn.2d 936, 938, 319 P.3d 31 (2014) (search of arrestee's bags reasonable where arrestee was carrying the laptop bag and pushing the rolling duffel bag at time of arrest); State v. Byrd, 178 Wn.2d 611, 621, 310 P.3d 793 (2013) (search of arrestee's purse reasonable where she was holding purse on her lap at time of arrest).

Cell phones carry heightened privacy concerns for individuals in

terms of both the quantity and quality of private information they contain. See Riley v. California, 573 U.S. 373, 393–96, 124 S.Ct. 2473, 189 L.Ed.2d 430 (2014) (noting that cell phones have vast storage capacity that typically contains sensitive personal information). Police may not automatically search the contents of a cell phone carried by or associated with an individual at the time of arrest, whether the cell phone is a smart phone or a standard cell phone. Riley v. California, 134 S.Ct. at 2492–93.

Breath tests to measure blood alcohol content, but not blood tests, are constitutionally permissible as searches incident to arrest. Birchfield v. North Dakota, __ U.S. __, 136 S.Ct. 2160, 2184, 195 L.Ed.2d 560 (2016); accord State v. Baird, 187 Wn.2d 210, 386 P.3d 239 (2016).

Search must be contemporaneous. A search may be considered "incident to arrest" even if it occurs shortly before the arrest, as long as there is probable cause to arrest at the time of the search. State v. Harrell, 83 Wn.App. 393, 400, 923 P.2d 698 (1996). In order to qualify for the exception, a search conducted after the arrest must be essentially contemporaneous; a significant delay between the arrest and the search renders the search unreasonable. See State v. Smith, 119 Wn.2d at 679, 683 (holding that a delay of 9 to 17 minutes is not unreasonable); United States v. Vasey, 834 F.2d 782, 786 (9th Cir. 1987) (holding that a delay of 30 to 45 minutes is unreasonable).

Causation. For discussions of causation, see the Comments to WPI 340.02 (Civil Rights—Individual Defendant—Burden of Proof on the Issues), WPI 340.04 (Civil Rights—"Subjects" and "Causes to be Subjected"—Definition), and WPI 340.06 (Causation—Comment Only) for a discussion of causation.

[Current as of September 2018.]

WPI 342.06

UNREASONABLE SEARCH—EXCEPTIONS TO WARRANT REQUIREMENT—CONSENT

A search is reasonable, and a search warrant is not required, if a person in lawful possession of the area searched has knowingly and voluntarily consented to the search.

[If a physically present co-occupant of the area refuses to consent, the police are not permitted to conduct a search of the area in the joint or sole possession of the co-occupant.]

NOTE ON USE

Use this instruction for a claim of an unreasonable search under the Fourth Amendment when issues of consent are involved.

Use this instruction with WPI 342.04 (Unreasonable Search—Burden of Proof on the Issues) and WPI 340.01 (Claims Instruction for Section 1983 Cases).

The bracketed sentence is to be used when: (1) more than one person is in lawful possession of the area to be searched; and (2) one (or more) of the occupants who is physically present at the time of the search refuses to consent even though the police obtain consent from a different occupant. See Comment below.

The instruction will need to be modified for a case that involves a search of a person rather than a place.

COMMENT

A similar pattern instruction is used by the Ninth Circuit. See 9th Cir. Civ. Jury Instr. 9.15 (2007).

A person's consent to search must be voluntary to be valid under the Fourth Amendment. Georgia v. Randolph, 547 U.S. 103, 126 S.Ct. 1515, 164 L.Ed.2d 208 (2006); Ohio v. Robinette, 519 U.S. 33, 40, 117 S.Ct. 417, 136 L.Ed.2d 347 (1996); State v. Shoemaker, 85 Wn.2d 207, 533 P.2d 123 (1975). If more than one lawful possessor of the area to be searched is present, and one occupant consents to the search but another refuses to consent, the police are not permitted to search the area

occupied by the non-consenting person. Georgia v. Randolph, 547 U.S. 103. If the initially-objecting occupant is removed by police when police had reasonable grounds for removal, the occupant is no longer physically present and police may obtain consent from a co-occupant. See Fernandez v. California, 571 U.S. 292, 301–03, 134 S.Ct. 1126, 1134, 188 L.Ed.2d 25 (2014) (consent search valid where objecting occupant arrested and removed by police on suspicion of assaulting co-occupant; co-occupant later offered consent to search); State v. Walker, 136 Wn.2d 678, 682–85, 965 P.2d 1079 (1998).

To determine voluntariness, the court must examine the totality of the circumstances. See United States v. Mendenhall, 446 U.S. 544, 557, 100 S.Ct. 1870, 64 L.Ed.2d 497 (1980) (airport search of drug courier); Schneckloth v. Bustamonte, 412 U.S. 218, 227, 93 S.Ct. 2041, 36 L.Ed.2d 854 (1973) (search of car stopped for traffic violation). Mere acquiescence to lawful authority is insufficient to constitute consent. United States v. Spires, 3 F.3d 1234, 1237 (9th Cir. 1993).

Factors in determining consent include: (1) whether the consenting person was in custody; (2) whether officers' guns were drawn; (3) whether the person was told he or she had the right to refuse a request to search; (4) whether the person was told he or she was free to leave; (5) whether *Miranda* warnings were given; and (6) whether the person was told a search warrant could be obtained. Liberal v. Estrada, 632 F.3d 1064, 1082 (9th Cir. 2011); United States v. Castillo, 866 F.2d 1071, 1082 (9th Cir. 1988).

The analysis of consent searches in Washington case law is based primarily on the Washington Constitution rather than the U.S. Constitution and, therefore, should not be relied upon in a Section 1983 case. See, e.g., State v. Khounvichai, 149 Wn.2d 557, 69 P.3d 862 (2003); State v. Ferrier, 136 Wn.2d 103, 960 P.2d 927 (1998).

[Current as of September 2018.]

WPI 342.07

UNREASONABLE SEARCH—EXCEPTIONS TO WARRANT REQUIREMENT—EXIGENT CIRCUMSTANCES

A search is reasonable, and a search warrant is not required, if all of the circumstances known to the officer at the time would cause a reasonable person to believe that [entry or] the search was necessary to [prevent physical harm to the officer or other persons] [prevent the destruction or concealment of evidence] [prevent the escape of a suspect] [give immediate aid to a person within the area to be searched] and there was insufficient time to get a search warrant.

NOTE ON USE

Use this instruction for a claim of an unreasonable search under the Fourth Amendment when issues of exigent circumstances are involved.

Use this instruction with WPI 342.04 (Unreasonable Search—Burden of Proof on the Issues) and WPI 340.01 (Claims Instruction for Section 1983 Cases). Use the bracketed language as applicable.

COMMENT

A similar pattern instruction is used by the Ninth Circuit. See 9th Cir. Civ. Jury Instr. 9.16 (2007).

Exigent circumstances include: (1) hot pursuit; (2) fleeing/escaping suspect; (3) danger to the arresting officer or the public; (4) mobility of a vehicle; and (5) mobility or destruction of the evidence. E.g., Minnesota v. Olson, 495 U.S. 91, 100, 110 S.Ct. 1684, 109 L.Ed.2d 85 (1990); United States v. Gooch, 6 F.3d 673, 679 (9th Cir. 1993) (includes "some other consequence improperly frustrating legitimate law enforcement efforts" as exigency); State v. Bessette, 105 Wn.App. 793, 21 P.3d 318 (2001); State v. Ramirez, 49 Wn.App. 814, 819 n.4, 746 P.2d 344 (1987). For a dangerous situation to be characterized as an emergency, it is not necessary for police to have "ironclad proof of a 'likely serious, life-threatening' injury." Michigan v. Fisher, 558 U.S. 45, 49, 130 S.Ct. 546, 175 L.Ed.2d 410 (2009) (per curiam); see also Brigham City v. Stuart, 547 U.S. 398, 403–07, 126 S.Ct. 1943, 164 L.Ed.2d 650 (2006). The test is "whether there was 'an objectively reasonable basis for believing' that

medical assistance was needed, or persons were in danger." Michigan v. Fisher, 558 U.S. 45, 49 (quoting *Brigham City*).

To determine whether entry without a warrant was justified by exigent circumstances, six factors may be considered: (1) whether a grave offense was involved; (2) whether the suspect was reasonably believed to be armed; (3) whether information about the suspect's guilt was trustworthy; (4) whether there was strong reason to believe the suspect was on the premises; (5) whether the suspect was likely to escape if not swiftly apprehended; and (6) whether entry could be made peaceably. See Ortiz-Sandoval v. Clarke, 323 F.3d 1165, 1171 (9th Cir. 2003); LaLonde v. County of Riverside, 204 F.3d 947 (9th Cir. 2000); State v. Terrovona, 105 Wn.2d 632, 644, 716 P.2d 295 (1986); State v. Cardenas, 146 Wn.2d 400, 47 P.3d 127 (2002). It is not necessary to have proof of every factor, "only the factors that are sufficient to show that the officers needed to act quickly." State v. Cardenas, 146 Wn.2d at 408.

When the evidence shows that police did not create the exigent circumstances "by engaging or threatening to engage in conduct that violates the Fourth Amendment, warrantless entry to prevent the destruction of evidence is reasonable and thus allowed." Kentucky v. King, 563 U.S. 452, 462, 131 S.Ct. 1849, 179 L.Ed.2d 865 (2011). Officers may not, however, create an exigency by engaging in conduct that violates the Fourth Amendment. See United States v. Lundin, 817 F.3d 1151, 1158 (9th Cir. 2016) (officers created exigency by unlawfully standing in curtilage of defendant's home at around 4 a.m, knocking on door, and claiming exigency when suspect made crashing noises inside home).

The United States Supreme Court has determined that the natural metabolization of alcohol in the bloodstream does not create a per se exigent circumstance. See Missouri v. McNeely, 569 U.S. 141, 152–53, 133 S.Ct. 1552, 185 L.Ed.2d 696 (2013). Similarly, domestic violence situations must be evaluated on the totality of the circumstances and are not per se exigent circumstances. See United States v. Brooks, 367 F.3d 1128, 1136 (9th Cir. 2004).

The "immediate aid" or emergency prong of this exception is derived from police officers' community caretaking function: a warrantless entry or search that would be otherwise barred may be justified by the need to protect life or avoid serious injury. See Brigham City v. Stuart, 547 U.S. 398, 126 S.Ct. 1943, 164 L.Ed.2d 650 (2006); United States v. Snipe, 515 F.3d 947 (9th Cir. 2008).

[Current as of September 2018.]

WPI 342.08

UNLAWFUL ARREST/SEIZURE OF PERSON—FOURTH AMENDMENT—EXCEPTION TO WARRANT REQUIREMENT—PROBABLE CAUSE TO BELIEVE CRIME COMMITTED

The [arrest] [or] [seizure] of a person is lawful, and a warrant is not required, only if all of the circumstances known to the officer at the time would cause a reasonable person to believe that a crime [was being] [had been] committed and that the [plaintiff] committed that crime.

NOTE ON USE

Use this instruction for a claim of an unlawful arrest/seizure under the Fourth Amendment that involves issues of probable cause to arrest for a crime in progress or a crime that just happened.

Use this instruction with WPI 342.09 (Unlawful Arrest/Seizure of Person—Probable Cause for Arrest/Seizure), WPI 340.01 (Claims Instruction for Section 1983 Cases), WPI 340.02 (Civil Rights—Individual Defendant—Burden of Proof on the Issues), WPI 340.03 (Civil Rights—"Under Color of Law"—Definition), WPI 340.04 (Civil Rights—"Subjects" and "Causes to be Subjected"—Definition), and WPI 342.02 (Definition of "Seizure" of a Person—Fourth Amendment), as applicable. Use the bracketed language as applicable.

COMMENT

The instruction and this Comment are modified from a pattern instruction used by the Ninth Circuit. See 9th Cir. Civ. Jury Instr. 9.23 (2007). This instruction is supported by state and federal precedent. See Devenpeck v. Alford, 543 U.S. 146, 152–53, 125 S.Ct. 588, 160 L.Ed.2d 537 (2004); Atwater v. City of Lago Vista, 532 U.S. 318, 354, 121 S.Ct. 1536, 149 L.Ed.2d 549 (2001); Beck v. Ohio, 379 U.S. 89, 97, 85 S.Ct. 223, 13 L.Ed.2d 142 (1964); State v. Pulfrey, 154 Wn.2d 517, 111 P.3d 1162 (2005); State v. Reding, 119 Wn.2d 685, 691–96, 835 P.2d 1019 (1992). See also the Comment to WPIC 120.07 (Lawful Arrest—Definition).

[Current as of September 2018.]

WPI 342.09

UNLAWFUL ARREST/SEIZURE OF PERSON—FOURTH AMENDMENT—EXCEPTION TO WARRANT REQUIREMENT—PROBABLE CAUSE—CONSIDERATIONS

Probable cause exists when, under all of the circumstances known to the [police officer] [person acting under color of state law] at the time, an objectively reasonable [police officer] [person acting under color of state law] would conclude there is a fair probability that a particular person has committed, or was in the act of committing, a crime.

Those facts [known by the defendant] need not meet the "beyond a reasonable doubt" standard that a jury uses for deciding whether to convict a person on trial for a crime. Mere suspicion or common rumor is not enough. There must be evidence that would allow a reasonable officer to conclude that a particular individual has committed or is in the process of committing a criminal offense.

Under [federal] [state] law, it is a crime to (insert elements or description of applicable crime for which probable cause allegedly existed).

NOTE ON USE

Use this instruction for a claim of an unreasonable seizure or arrest under the Fourth Amendment that involves issues of probable cause to arrest for a crime in progress or a crime that just happened.

Use this instruction with WPI 342.08 (Unlawful Arrest/Seizure of Person—Fourth Amendment—Exceptions to Warrant Requirement—Probable Cause to Believe Crime Committed); and WPI 340.01 (Claims Instruction for Section 1983 Cases); WPI 340.02 (Civil Rights—Individual Defendant—Burden of Proof on the Issues); WPI 340.03 (Civil Rights—"Under Color of Law"—Definition); WPI 340.04 (Civil Rights—"Subjects" and "Causes to be Subjected"—Definition); and WPI 342.02 (Definition of "Seizure" of a Person—Fourth Amendment) as applicable. Use the bracketed language as applicable.

COMMENT

The instruction and this Comment are modified from a pattern

instruction used by the Ninth Circuit. See 9th Cir. Civ. Jury Instr. 9.23 (2007). This instruction is supported by state and federal precedent. Devenpeck v. Alford, 543 U.S. 146, 152–53, 125 S.Ct. 588, 160 L.Ed.2d 537 (2004); Maryland v. Pringle, 540 U.S. 366, 371, 124 S.Ct. 795, 157 L.Ed.2d 769 (2003); Atwater v. City of Lago Vista, 532 U.S. 318, 354, 121 S.Ct. 1536, 149 L.Ed.2d 549 (2001); Beck v. Ohio, 379 U.S. 89, 97, 85 S.Ct. 223, 13 L.Ed.2d 142 (1964); State v. Pulfrey, 154 Wn.2d 517, 111 P.3d 1162 (2005); State v. Reding, 119 Wn.2d 685, 835 P.2d 1019 (1992).

Probable cause is a mixed question of law and fact: the jury makes a determination about underlying facts if there are material disputes of fact; if there are no material disputes of fact then the court makes the determination whether probable cause existed. See Dubner v. City & County of San Francisco, 266 F.3d 959, 965 (9th Cir. 2001); McKenzie v. Lamb, 738 F.2d 1005, 1007–08 (9th Cir. 1984). Summary judgment on the probable cause defense is appropriate if no reasonable jury could conclude that the police lacked probable cause to arrest plaintiff. Torres v. City of Los Angeles, 548 F.3d 1197, 1208 (9th Cir. 2008). See also the Comment to WPIC 120.07 (Lawful Arrest—Definition).

[Current as of September 2018.]

WPI 342.10

UNLAWFUL SEIZURE OF PERSON—FOURTH AMENDMENT—EXCEPTION TO WARRANT REQUIREMENT—REASONABLE SUSPICION FOR INVESTIGATORY STOP

When a police [or other peace] officer briefly stops a person without a warrant in order to investigate criminal activity, this brief stop is lawful if the officer has a reasonable suspicion the person stopped [is] [has been] engaged in criminal activity.

"Reasonable suspicion" is present when the officer has an objective belief, based on specific and articulable facts, that would justify stopping [the plaintiff] in order to investigate possible criminal activity.

[If the plaintiff was present [in a place] [at a time of day] where criminal activity often happens, this circumstance without more does not create "reasonable suspicion."]

[If the plaintiff refused to answer questions or refused to cooperate with the investigation, and peacefully went about [his] [her] business, this behavior without more does not constitute "reasonable suspicion."]

[If the plaintiff responded to the police officer's presence by fleeing, this behavior without more does not constitute reasonable suspicion.]

NOTE ON USE

Use this instruction for a claim of an unlawful seizure under the Fourth and Fourteenth Amendments when a *Terry* stop is involved.

Use this instruction as applicable with WPI 342.08 (Unlawful Arrest/Seizure of Person—Fourth Amendment—Exceptions to Warrant Requirement—Probable Cause to Believe Crime Committed), WPI 342.09 (Unlawful Arrest/Seizure of Person—Fourth Amendment—Exceptions to Warrant Requirement—Probable Cause—Considerations), WPI 340.01

(Claims Instruction for Section 1983 Cases), WPI 340.02 (Civil Rights—Individual Defendant—Burden of Proof on the Issues), WPI 340.03 (Civil Rights—"Under Color of Law"—Definition), WPI 340.04 (Civil Rights—"Subjects" and "Causes to be Subjected"—Definition), and WPI 342.02 (Definition of "Seizure" of a Person—Fourth Amendment.) Use the bracketed language as applicable.

COMMENT

The instruction has been revised for this edition to reflect that flight without more does not constitute reasonable suspicion. State v. Gatewood, 163 Wn.2d 534, 182 P.3d 426 (2008); State v. Howerton, 187 Wn.App. 357, 348 P.3d 781 (2015).

The instruction and this Comment are modified from a pattern instruction used by the Ninth Circuit. See 9th Cir. Civ. Jury Instr. 9.21 (2007). This instruction is supported by state and federal precedent. Illinois v. Wardlow, 528 U.S. 119, 123–25, 120 S.Ct. 673, 145 L.Ed.2d 570 (2000); Florida v. Bostick, 501 U.S. 429, 437, 111 S.Ct. 2382, 115 L.Ed.2d 389 (1991); United States v. Sokolow, 490 U.S. 1, 7, 109 S.Ct. 1581, 104 L.Ed.2d 1 (1989); Florida v. Royer, 460 U.S. 491, 103 S.Ct. 1319, 75 L.Ed.2d 229 (1983); Terry v. Ohio, 392 U.S. 1, 17, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968); State v. Doughty, 170 Wn.2d 57, 239 P.3d 573 (2010); State v. Day, 161 Wn.2d 889, 168 P.3d 1265 (2007); State v. Duncan, 146 Wn.2d 166, 43 P.3d 513 (2002); McKinney v. City of Tukwila, 103 Wn.App. 391, 403–04, 13 P.3d 631 (2000).

With regard to avoiding comments on the evidence, see the Comment to WPI 340.01 (Claims Instruction for Section 1983 Cases).

[Current as of September 2018.]

CHAPTER 343

CIVIL RIGHTS—CONDITIONS OF CONFINEMENT

WPI 343.00 Introduction—Conditions of Confinement—Eighth Amendment and Fourteenth Amendment

WPI 343.01 General Conditions of Confinement—Eighth Amendment—Burden of Proof on the Issues

WPI 343.02 Conditions of Confinement—Eighth Amendment—Deliberate Indifference—General Conditions of Confinement

WPI 343.03 Conditions of Confinement/Medical Care—Eighth Amendment—Burden of Proof on the Issues

WPI 343.04 Conditions of Confinement—Eighth Amendment—Deliberate Indifference—Medical

WPI 343.05 Conditions of Confinement/Failure to Protect—Eighth Amendment—Burden of Proof on the Issues

WPI 343.06 Conditions of Confinement—Eighth Amendment—Deliberate Indifference—Failure to Protect

WPI 343.07 Conditions of Confinement/Failure to Protect—Fourteenth Amendment—Burden of Proof on the Issues

WPI 343.08 Conditions of Confinement—Eighth Amendment—Excessive Force—Burden of Proof on the Issues

WPI 343.00

INTRODUCTION—CONDITIONS OF CONFINEMENT—EIGHTH AMENDMENT AND FOURTEENTH AMENDMENT

Organization of this chapter. For this edition, the WPI Committee substantially reorganized WPI Chapter 343 because of changes in the law. This chapter now provides separate pattern instructions under the Eighth Amendment (applicable to convicted inmates) and the Fourteenth Amendment (applicable to pretrial detainees). This is because the United States Supreme Court and the Courts of Appeals sometimes apply differing standards depending upon which constitutional amendment applies to the plaintiff's claims.

This chapter is further organized into separate pattern instructions

according to the type of potential claim (general conditions of confinement, failure to protect, medical, and use of force). This is because there are differences in how the Eighth Amendment and Fourteenth Amendment standards are expressed in some of these areas.

Eighth Amendment claims. The Eighth Amendment applies to persons sentenced and held in custody and imposes certain duties on prison officials: (1) to provide humane conditions of confinement; (2) to ensure that inmates receive adequate food, clothing, shelter, and medical care; and (3) to "take reasonable measures to guarantee the safety of the inmates." Farmer v. Brennan, 511 U.S. 825, 832, 114 S.Ct. 1970, 128 L.Ed.2d 811 (1994) (citing Hudson v. Palmer, 468 U.S. 517, 526–27, 104 S.Ct. 3194, 82 L.Ed.2d 393 (1984)).

An Eighth Amendment conditions of confinement claim has two components - the plaintiff must show that the defendant: (1) exposed the plaintiff to a substantial risk of serious harm; and (2) was deliberately indifferent to the plaintiff's constitutional rights. Farmer v. Brennan, 511 U.S. at 837, 842; Mendiola-Martinez v. Arpaio, 836 F.3d 1239, 1248 (9th Cir. 2016).

To satisfy the first component, the deprivation alleged must be, objectively, "sufficiently serious" such as "incarcerat[ion] under conditions posing a substantial risk of serious harm." Mendiola-Martinez v. Arpaio, 836 F.3d 1239, 1248 (9th Cir. 2016). A deprivation is sufficiently serious when the prison official's act or omission results "in the denial of the minimal civilized measure of life's necessities." Farmer v. Brennan, 511 U.S. at 834.

To satisfy the second component, the plaintiff must prove subjective recklessness or deliberate indifference by the official.

> [An official] cannot be found liable under the Eighth Amendment for denying an inmate humane conditions of confinement unless the official knows of and disregards an excessive risk to inmate health or safety; the official must both be aware of facts from which the inference could be drawn that a substantial risk of serious harm exists, and he must also draw the inference.

Farmer v. Brennan, 511 U.S. 825, 837, 114 S.Ct. 1970, 128 L.Ed.2d 811 (1994). "An Eighth Amendment claimant need not show that a prison official acted or failed to act believing that harm actually would befall an inmate; it is enough that the official acted or failed to act despite his knowledge of a substantial risk of serious harm." Farmer v. Brennan, 511 U.S. at 842.

Constructive notice does not suffice to prove the requisite knowl-

edge, but "[w]hether a prison official had the requisite knowledge of a substantial risk is a question of fact subject to demonstration in the usual ways, including inference from circumstantial evidence." Farmer v. Brennan, 511 U.S. at 841–42; see also Harrington v. Scribner, 785 F.3d 1299, 1304 (9th Cir. 2015) (rejecting the constructive notice argument). In making this determination, the jury may consider whether "the circumstances suggest that the [official] being sued had been exposed to information concerning the risk and thus 'must have known' about it." Farmer v. Brennan, 511 U.S. at 841–42.

This deliberate indifference standard is the same for all conditions of confinement claims under the Eighth Amendment. Wilson v. Seiter, 501 U.S. 294, 303, 111 S.Ct. 2321, 115 L.Ed.2d 271 (1991). However, because there are some differences in how the deliberate indifference standard is expressed for each type of conditions of confinement claim, this chapter contains separate pattern instructions for each claim type.

For Eighth Amendment general conditions of confinement claims, use WPI 343.01 (General Conditions of Confinement—Eighth Amendment—Burden of Proof on the Issues) with WPI 343.02 (Conditions of Confinement—Eighth Amendment—Deliberate Indifference—General Conditions of Confinement).

For Eighth Amendment medical claims, use WPI 343.03 (Conditions of Confinement/Medical Care—Eighth Amendment—Burden of Proof on the Issues) with WPI 343.04 (Conditions of Confinement—Eighth Amendment—Deliberate Indifference).

For Eighth Amendment failure to protect claims, use WPI 343.05 (Conditions of Confinement/Failure to Protect—Eighth Amendment—Burden of Proof on the Issues) with WPI 343.06 (Conditions of Confinement—Eighth Amendment—Deliberate Indifference—Failure to Protect).

For Eighth Amendment excessive force claims, use WPI 343.08 (Conditions of Confinement—Eighth Amendment—Excessive Force—Burden of Proof on the Issues).

Fourteenth Amendment claims. The Fourteenth Amendment, instead of the Eighth Amendment, applies to persons who have been arrested but not yet arraigned, and to pretrial detainees—those who have been arraigned, but not yet convicted or sentenced for a crime. Bell v. Wolfish, 441 U.S. 520, 535–39, 99 S.Ct. 1861, 60 L.Ed.2d 447 (1979). Because persons who are in custody pending arraignment, and pretrial detainees, are being held on probable cause but are not being punished, there is no authority for the state to use punishment in their confinement. Any conditions of confinement must be in accordance with substantive due process and fundamental fairness principles under the Fourteenth Amendment. Bell v. Wolfish, 441 U.S. 520.

Because pretrial detainees' rights under the Fourteenth Amendment have historically been considered comparable to prisoners' rights under the Eighth Amendment, the Ninth Circuit Court of Appeals has applied the same standard to both. See Frost v. Agnos, 152 F.3d 1124 (9th 1998); Anderson v. County of Kern, 45 F.3d 1310, 1313 (9th Cir. 1995).

However, in Kingsley v. Hendrickson, __ U.S. __, 135 S.Ct. 2466, 2472–73, 192 L.Ed.2d 416 (2015), the Supreme Court rejected the use of the Eighth Amendment subjective deliberate indifference standard for excessive force claims. Instead, excessive force claims brought by pretrial detainees are analyzed under a Fourteenth Amendment objective reasonableness standard. Kingsley v. Hendrickson, 135 S.Ct. 2466, 2472–73.

The federal courts have begun to determine whether the ruling in *Kingsley* should apply to other types of pretrial detainee claims. For example, the Ninth Circuit Court of Appeals has previously relied on the Eighth Amendment standard of care that requires proof of deliberate indifference. See Clouthier v. County of Contra Costa, 591 F.3d 1232, 1241–44 (9th Cir. 2010). Following *Kingsley*, the Ninth Circuit Court of Appeals reversed *Clouthier* "to the extent that it identified a single deliberate indifference standard for all § 1983 claims and to the extent that it required a plaintiff to prove an individual defendant's subjective intent to punish in the context of a pretrial detainee's failure-to-protect claim." Castro v. County of Los Angeles, 833 F.3d 1060, 1070 (9th Cir. 2016) (en banc), cert. denied 137 S.Ct. 831 (2017).

The ruling in *Castro* specifically applied to a pretrial detainee's failure-to-protect claims and it is unclear whether *Castro* and *Kingsley* apply generally to all types of pretrial detainee conditions of confinement claims. The Second Circuit, following the reasoning in *Castro*, now applies the objective standard to all Fourteenth Amendment conditions of confinement claims. Darnell v. Piniero, 849 F.3d 17, 35–36 (2nd Cir. 2017).

However, in the context of pretrial detainee medical claims, other circuits have continued to apply a subjective standard of deliberate indifference. See Rife v. Oklahoma Dep't. of Pub. Safety, 854 F.3d 637, 647 (11th Cir. 2017), cert. denied 138 S.Ct. 364; Alderson v. Concordia Parish Correctional Facility, 848 F.3d 415, 419–20 (5th Cir. 2017); Dadd v. Onoka County, 827 F.3d 749, 755 (8th Cir. 2016); Smith v. Dart, 803 F.3d 304, 310 (7th Cir. 2015); Baynes v. Cleveland, 799 F.3d 600, 617–18 (6th Cir. 2015).

For further discussion of this topic, see the Comment to Ninth Cir. Civ. Jury Instr. 9.30 (2007), and Hatter v. Dyer, 154 F.Supp.3d 940 (C.D. Cal. 2015) (summarizing the Supreme Court and Ninth Circuit

precedent on whether the Eight Amendment deliberate indifference standard applies to general conditions of confinement claims by pretrial detainees).

With respect to all Fourteenth Amendment claims against a municipality arising under Monell v. Dept. of Soc. Serv., 436 U.S. 658, 98 S.Ct. 2018, 56 L.Ed.2d 611 (1978), the Ninth Circuit has held that a plaintiff must show the municipality's deliberate indifference under an "objective inquiry." Castro v. County of Los Angeles, 833 F.3d 1060, 1076 (9th Cir. 2016), cert. denied 137 S.Ct. 831 (2017). "This objective standard necessarily applied to municipalities for the practical reason that government entities, unlike individuals, do not themselves have states of mind[.]" Castro v. County of Los Angeles, 833 F.3d 1060, 1076.

This chapter includes a proposed objective reasonableness instruction for use in a pretrial detainee failure to protect claim when the trial court has decided to apply the *Castro* standard. See WPI 343.07 (Conditions of Confinement/Failure to Protect—Fourteenth Amendment—Burden of Proof on the Issues). If the trial court has decided to apply the pre-*Castro* deliberate indifference standard to a pretrial detainee failure to protect claim, modify and use WPI 343.05 (Conditions of Confinement/Failure to Protect—Eighth Amendment—Burden of Proof on the Issues) with WPI 343.06 (Conditions of Confinement—Eighth Amendment—Deliberate Indifference—Failure to Protect).

This chapter does not include proposed objective reasonableness instructions for use in pretrial detainee general conditions of confinement or medical claims because the law is unsettled in these areas.

This chapter does not include a proposed objective reasonableness instruction for use in a pretrial detainee excessive force claim because the Supreme Court did not provide guidance in *Kingsley* on the appropriate jury instruction.

Standard applicable to convicted inmates who are awaiting sentencing. The Supreme Court has not analyzed whether the Eighth Amendment is applicable to detainees who have been convicted and are awaiting sentencing, but it has suggested that the Eighth Amendment does not attach until after conviction and sentence. Graham v. Connor, 490 U.S. 386, 392 n.6, 109 S.Ct. 1865, 104 L.Ed.2d 443 (1989) (noting that Ingraham v. Wright, 430 U.S. 651, 671 n.40, 97 S.Ct. 1401, 51 L.Ed.2d 711 (1977) established that "the Eighth Amendment's protections did not attach until after conviction and sentence").

Deference to prison officials. For cases involving a policy or practice addressing a bona fide safety and security concern when there is evidence that the challenged decision was made pursuant to that security-based policy or practice, the pattern instructions in this chapter

may need to be modified by adding a deference instruction. Chess v. Dovey, 790 F.3d 961, 974 (9th Cir. 2015). In such situations, including in hybrid situations where the security concern overlaps with the contested condition of confinement, the court must instruct the jury to defer to the prison officials who adopted and executed a practice or policy needed to preserve discipline and maintain internal security. Mendiola-Martinez v. Arpaio, 836 F.3d 1239, 1255 (2016). However, deference need not be given to officials if there is substantial evidence demonstrating their response to the situation is exaggerated. Florence v. Bd. Of Chosen Freeholders of Cty. Of Burlington, 566 U.S. 318, 330, 132 S.Ct. 1510, 182 L.Ed.2d 566 (2012); Mendiola-Martinez v. Arpaio, 836 F.3d at 1255.

In cases where there is evidence that the defendant prison official lacks authority over budgeting decisions, the pattern instructions in this chapter may need to be modified to allow the jury to consider whether the prison official met his or her duties to an inmate in the context of the personnel, financial, and other resources available to the official or which he or she could reasonably obtain. Peralta v. Dillard, 744 F.3d 1076, 1083–84 (9th Cir. 2014).

Involuntary civil commitment and minimally adequate or reasonable training. In Youngberg v. Romeo, 457 U.S. 307, 315, 102 S.Ct. 2452, 73 L.Ed.2d 28 (1982), the Supreme Court determined that a person who has been involuntarily committed by the state due to a mental disability has a Fourteenth Amendment liberty interest to receive adequate or reasonable training during the course of his or her confinement. Such training is necessary to ensure the person's physical safety and to prevent unnecessary use of restraints. Youngberg v. Romeo, 457 U.S. at 324; see also Jackson v. Indiana, 406 U.S. 715, 738, 92 S.Ct. 1845, 32 L.Ed.2d 435 (1972).

The Fourteenth Amendment was intended to prevent the state "from abusing [its] power, or employing it as an instrument of oppression." DeShaney v. Winnebago County Dep't of Soc. Servs., 489 U.S. 189, 196, 109 S.Ct. 998, 103 L.Ed. 2d 249 (1989). The right to minimally adequate or reasonable training does not apply if a person is not in state custody, but in some situations it may apply to a person who is voluntarily committed. DeShaney v. Winnebago County Dep't of Soc. Servs., 489 U.S. at 196; Lanman v. Hinson, 529 F.3d 673 (6th Cir. 2008); Torisky v. Schweiker, 446 F.3d 438 (3rd Cir. 2006); Kaho'ohanohano v. Dep't of Human Servs., 117 Haw. 262, 296, 178 P.3d 538 (2008).

Comments on the evidence. With regard to avoiding comments on the evidence, see the Comment to WPI 340.01 (Claims Instruction for Section 1983 Cases).

[Current as of September 2018.]

WPI 343.01

GENERAL CONDITIONS OF CONFINEMENT—EIGHTH AMENDMENT—BURDEN OF PROOF ON THE ISSUES

(Name of plaintiff) **claims that** (name of defendant) **subjected** (name of plaintiff) **to a deprivation of [his] [her] Eighth Amendment constitutional right to be free from cruel and unusual punishment] while confined. This includes the right to** (specify particular constitutional interest).

(Name of plaintiff) **has the burden of proving each of the following propositions:**

(1) That (name of plaintiff) **faced a substantial risk of serious harm;**

(2) That (name of defendant) **was deliberately indifferent to that risk;**

(3) That (name of defendant) was acting under color of law; and

(4) That (name of defendant)'s **actions [proximately] caused injury or damage to** (name of plaintiff).

If you find from your consideration of all the evidence that each of these propositions has been proved, then your verdict should be for (name of plaintiff) **[on this claim]. On the other hand, if any of these propositions has not been proved, then your verdict should be for** (name of defendant) **[on this claim].**

NOTE ON USE

Use this instruction for Eighth Amendment claims involving medical needs of incarcerated persons who have been convicted and sentenced for a crime.

See WPI 343.00 (Conditions of Confinement—Eighth Amendment

and Fourteenth Amendment—Introduction) regarding whether to use or modify this instruction for a general conditions of confinement claim brought by a pretrial detainee under the Fourteenth Amendment.

Use this instruction with WPI 340.01 (Claims Instruction for Section 1983 Cases) and WPI 340.03 (Civil Rights—"Under Color of Law"—Definition). Use this instruction in place of WPI 340.02 (Civil Rights—Individual Defendant—Burden of Proof on the Issues).

If there are genuine issues of material fact concerning deliberate indifference in a claim brought under the Eighth Amendment, use WPI 343.02 (Conditions of Confinement—Eighth Amendment—Deliberate Indifference—General Conditions of Confinement) with this instruction.

Do not use WPI 341.04 (Civil Rights—Failure to Train or Inadequate Training—Municipal Liability—"Deliberate Indifference"—Definition) with this instruction. WPI 341.04 is not appropriate for use in an Eighth or Fourteenth Amendment conditions of confinement case.

For discussions of causation and the bracketed word "proximately," see the Comments to WPI 340.02 (Civil Rights—Individual Defendant—Burden of Proof on the Issues), WPI 340.04 (Civil Rights—"Subjects" and "Causes to be Subjected"—Definition), and WPI 340.06 (Causation—Comment Only).

Use this instruction with WPI 21.01 (Meaning of Burden of Proof—Preponderance of Evidence).

For medical claims brought under the Eighth Amendment, use WPI 343.03 (Conditions of Confinement/Medical Care—Eighth Amendment—Burden of Proof on the Issues) instead of this instruction. For medical claims brought under the Fourteenth Amendment, see the Comment to WPI 343.03.

For failure to protect claims brought under the Eighth Amendment, use WPI 343.05 (Conditions of Confinement/Failure to Protect—Eighth Amendment—Burden of Proof on the Issues) instead of this instruction. For failure to protect claims brought under the Fourteenth Amendment, use WPI 343.07 (Conditions of Confinement/Failure to Protect—Fourteenth Amendment—Burden of Proof on the Issues).

COMMENT

This instruction is new for this edition. The instruction designated as WPI 343.01 in previous editions can be found at WPI 343.03 (Conditions of Confinement/Medical Care—Eighth Amendment—Burden of Proof on the Issues.)

See WPI 343.00 (Conditions of Confinement—Eighth Amendment

and Fourteenth Amendment—Introduction) for a discussion of this and other Eighth and Fourteenth Amendment conditions of confinement claims.

If some or all of the allegations are that the defendant did not directly take action or fail to take action regarding the deprivations alleged by plaintiff, but instead defendant caused the plaintiff to be harmed by deliberate indifference because of the acts or omissions of others under official policies, the instruction will need to be modified accordingly.

[Current as of September 2018.]

WPI 343.02

CONDITIONS OF CONFINEMENT—EIGHTH AMENDMENT—DELIBERATE INDIFFERENCE—GENERAL CONDITIONS OF CONFINEMENT

"Deliberate indifference," as used in these instructions, means:

(1) the defendant was aware of a substantial risk that the plaintiff would be seriously harmed, and

(2) the defendant consciously failed or refused to take reasonable steps to address the substantial risk of serious harm.

Negligence or inadvertence alone does not constitute deliberate indifference.

NOTE ON USE

Use this instruction as the definition of deliberate indifference for an Eighth Amendment claim that the defendant failed to address a significant risk of serious harm to plaintiff from a general condition of confinement while the plaintiff was in custody after conviction.

See WPI 343.00 (Conditions of Confinement—Eighth Amendment and Fourteenth Amendment—Introduction) regarding whether to use or modify this instruction for a general conditions of confinement claim brought by a pretrial detainee under the Fourteenth Amendment.

Use this instruction with WPI 340.01 (Claims Instruction for Section 1983 Cases); WPI 340.03 (Civil Rights—"Under Color of Law"—Definition); WPI 340.04 (Civil Rights—"Subjects" and "Causes to be Subjected"—Definition); WPI 343.01 (General Conditions of Confinement—Eighth Amendment—Burden of Proof on the Issues).

Do not use WPI 341.04 (Civil Rights—Failure to Train or Inadequate Training—Municipal Liability—"Deliberate Indifference"—Definition) as the definition of deliberate indifference, unless there is an issue about failure to train or inadequate training, in the context of a cause of action against municipal defendant or other local government defendant.

For the definition of deliberate indifference in a medical claim brought under the Eighth Amendment, use WPI 343.04 (Conditions of

Confinement—Eighth Amendment—Deliberate Indifference—Medical) instead of this instruction.

For the definition of deliberate indifference in a failure to protect claim brought under the Eighth Amendment, use WPI 343.06 (Conditions of Confinement—Eighth Amendment—Deliberate Indifference—Failure to Protect) instead of this instruction.

COMMENT

This instruction is new for this edition. The instruction that was designated as WPI 343.02 in previous editions can be found at WPI 343.04 (Conditions of Confinement—Eighth Amendment—Deliberate Indifference—Medical.)

See WPI 343.00 (Conditions of Confinement—Eighth Amendment and Fourteenth Amendment—Introduction) for a discussion of this and other Eighth and Fourteenth Amendment conditions of confinement claims.

This instruction is based on Farmer v. Brennan, 511 U.S. 825, 837–38, 114 S.Ct. 1970, 128 L.Ed.2d 811 (1994); Helling v. McKinney, 509 U.S. 25, 33–36, 113 S.Ct. 2475, 125 L.Ed.2d 22 (1993); Wilson v. Seiter, 501 U.S. 294, 303–06, 111 S.Ct. 2321, 115 L.Ed.2d 271 (1991); Estelle v. Gamble, 429 U.S. 97, 97 S.Ct. 285, 50 L.Ed.2d 251 (1976); and Estate of Ford v. Ramirez-Palmer, 301 F.3d 1043, 1049–52 (9th Cir. 2002).

[Current as of September 2018.]

WPI 343.03

CONDITIONS OF CONFINEMENT/MEDICAL CARE—EIGHTH AMENDMENT—BURDEN OF PROOF ON THE ISSUES

(Name of plaintiff) **claims that** (name of defendant) **subjected** (name of plaintiff) **to a deprivation of [his] [her] Eighth Amendment constitutional right to be free from cruel and unusual punishment. This includes the right to receive adequate medical care for serious medical needs while confined.**

(Name of plaintiff) **has the burden of proving each of the following propositions:**

(1) That (name of plaintiff) **faced a serious medical need;**

(2) That (name of defendant) **was deliberately indifferent to the serious medical need faced by** (name of plaintiff)**;**

(3) That (name of defendant) **was acting under color of law; and**

(4) That (name of defendant's) **actions [proximately] caused injury or damage to** (name of plaintiff)**.**

If you find from your consideration of all the evidence that each of these propositions has been proved, then your verdict should be for (name of plaintiff) **[on this claim]. On the other hand, if any of these propositions has not been proved, then your verdict should be for** (name of defendant) **[on this claim].**

NOTE ON USE

Use this instruction for Eighth Amendment claims involving medical needs of incarcerated persons who have been convicted and sentenced for a crime. For medical claims brought by a pretrial detainee under the Fourteenth Amendment, see WPI 343.00 (Introduction—Conditions of Confinement—Eighth Amendment and Fourteenth Amendment) regarding whether to use or modify this instruction.

Use this instruction with WPI 340.01 (Claims Instruction for Section 1983 Cases) and WPI 340.03 (Civil Rights—"Under Color of Law"—Definition). Use this instruction in place of WPI 340.02 (Civil Rights—Individual Defendant—Burden of Proof on the Issues).

If there are genuine issues of material fact concerning deliberate indifference in a claim brought under the Eighth Amendment, use WPI 343.04 (Conditions of Confinement—Eighth Amendment—Deliberate Indifference—Medical) with this instruction.

Do not use WPI 341.04 (Civil Rights—Failure to Train or Inadequate Training—Municipal Liability—"Deliberate Indifference"—Definition) with this instruction. WPI 341.04 is not appropriate for use in an Eighth or Fourteenth Amendment conditions of confinement case.

For discussions of causation and the bracketed word "proximately," see the Comments to WPI 340.02 (Civil Rights—Individual Defendant—Burden of Proof on the Issues), WPI 340.04 (Civil Rights—"Subjects" and "Causes to be Subjected"—Definition), and WPI 340.06 (Causation—Comment Only).

Do not use medical malpractice instructions for claims that are brought under the Eighth or Fourteenth Amendments. See the Comment below.

Use this instruction with WPI 21.01 (Meaning of Burden of Proof—Preponderance of Evidence).

For general conditions of confinement claims brought under the Eighth Amendment, use WPI 343.01 (General Conditions of Confinement—Eighth Amendment—Burden of Proof on the Issues) instead of this instruction. For general conditions of confinement claims brought under the Fourteenth Amendment, see WPI 343.00 (Conditions of Confinement—Eighth Amendment and Fourteenth Amendment—Introduction).

For failure to protect claims brought under the Eighth Amendment, use WPI 343.05 (Conditions of Confinement/Failure to Protect—Eighth Amendment—Burden of Proof on the Issues) instead of this instruction. For failure to protect claims brought under the Fourteenth Amendment, use WPI 343.07 (Conditions of Confinement/Failure to Protect—Fourteenth Amendment—Burden of Proof on the Issues).

COMMENT

Prior to this edition, this instruction was designated as WPI 343.01. This instruction now applies only to claims under the Eighth Amendment.

See WPI 343.00 (Introduction—Conditions of Confinement—Eighth

Amendment and Fourteenth Amendment) for a discussion of this and other Eighth and Fourteenth Amendment conditions of confinement claims.

Convicted prisoner medical claims. The Eighth Amendment imposes a duty on prison officials to ensure that inmates receive adequate medical care. Farmer v. Brennan, 511 U.S. 825, 832, 114 S.Ct. 1970, 128 L.Ed.2d 811 (1994).

If a doctor, correctional officer, or any other official acts or fails to act, under circumstances that establish deliberate indifference to the serious medical needs of a person who is incarcerated, this constitutes "unnecessary and wanton infliction of pain" and is prohibited by the Eighth Amendment. Estelle v. Gamble, 429 U.S. 97, 104–05, 97 S.Ct. 285, 50 L.Ed.2d 251 (1976).

For a medical claim under the Eighth Amendment the plaintiff must establish more than negligence on the defendant's part. Estelle v. Gamble, 429 U.S. 97, 104, 97 S.Ct. 285, 50 L.Ed.2d 251 (1976); Mendiola-Martinez v. Arpaio, 836 F.3d 1239, 1248 (9th Cir. 2016). To prove a violation of the Eighth Amendment, a plaintiff must show that the defendant: (1) exposed plaintiff to a substantial risk of serious harm; and (2) was deliberately indifferent to plaintiff's constitutional rights. Mendiola-Martinez v. Arpaio, 836 F.3d at 1248 (citing Farmer v. Brennan, 511 U.S. 825, 832, 114 S.Ct. 1970, 128 L.Ed.2d 811 (1994).

Whether a condition is serious, whether the defendant was deliberately indifferent, and whether the deliberate indifference of the defendant proximately caused harm to the plaintiff, are all questions of fact for the jury. Gayton v. McCoy, 593 F.3d 610, 620 (7th Cir. 2010). The plaintiff must overcome the qualified immunity standard, see the Comment to WPI 340.01 (Claims Instruction for Section 1983 Cases), and summary judgment. See generally Whitley v. Albers, 475 U.S. 312, 106 S.Ct. 1078, 89 L.Ed.2d 251 (1986), abrogated on other grounds in Wilkins v. Gaddy, 559 U.S. 34, 130 S.Ct. 1175, 1178–79, 175 L.Ed.2d 995 (2010).

Distinguishing medical malpractice claims. The standards for medical malpractice claims are quite different than for constitutional claims under the Eighth and Fourteenth Amendments. If both types of claims are included in a single case, the instructions will need to carefully maintain the proper distinctions.

[Current as of September 2018.]

WPI 343.04

CONDITIONS OF CONFINEMENT—EIGHTH AMENDMENT—DELIBERATE INDIFFERENCE—MEDICAL

"Deliberate indifference," as used in these instructions, means:

(1) the defendant had actual knowledge of a significant risk that the plaintiff had a serious medical need, and

(2) the defendant consciously failed or refused to take reasonable steps to address plaintiff's serious medical need.

Negligence or inadvertence alone does not constitute deliberate indifference.

NOTE ON USE

Use this instruction for an Eighth Amendment claim that defendant failed to meet the serious medical needs of plaintiff while plaintiff was in custody serving a sentence.

See the Comment to WPI 343.00 (Introduction—Conditions of Confinement/Medical Care—Eighth Amendment) regarding whether to use or modify this instruction for a medical care claim brought by a pretrial detainee under the Fourteenth Amendment.

Use this instruction with WPI 340.01 (Claims Instruction for Section 1983 Cases), WPI 340.03 (Civil Rights—"Under Color of Law"—Definition), WPI 340.04 (Civil Rights—"Subjects" and "Causes to be Subjected"—Definition), and WPI 343.03 (Conditions of Confinement—Medical Care—Eighth Amendment—Burden of Proof on the Issues).

Do not use WPI 341.04 (Civil Rights—Failure to Train or Inadequate Training—Municipal Liability—"Deliberate Indifference"—Definition) as the definition of deliberate indifference, unless there is an issue about failure to train or inadequate training in the context of a cause of action against municipal defendant or other local government defendant.

For the definition of deliberate indifference in a general conditions of confinement claims brought under the Eighth Amendment, use WPI

343.02 (Conditions of Confinement—Eighth Amendment—Deliberate Indifference—General Conditions of Confinement) instead of this instruction.

For the definition of deliberate indifference in a failure to protect claims brought under the Eighth Amendment, use WPI 343.06 (Conditions of Confinement—Eighth Amendment—Deliberate Indifference—Failure to Protect) instead of this instruction.

COMMENT

Prior to this edition, this instruction was designated as WPI 343.02. This instruction now applies only to claims under the Eighth Amendment.

See the Comment to WPI 343.00 (Introduction—Conditions of Confinement—Eighth Amendment and Fourteenth Amendment) for a discussion of this and other Eighth and Fourteenth Amendment conditions of confinement claims.

The instruction is based on Farmer v. Brennan, 511 U.S. 825, 837–38, 114 S.Ct. 1970, 128 L.Ed.2d 811 (1994), Wilson v. Seiter, 501 U.S. 294, 303–06, 111 S.Ct. 2321, 115 L.Ed.2d 271 (1991), and Estelle v. Gamble, 429 U.S. 97, 97 S.Ct. 285, 50 L.Ed.2d 251 (1976). See also Ninth Cir. Civ. Jury Instr. 9.27 (2007); Comment, Eighth Cir. Civ. Jury Instr. 4.43 (last updated 2017).

Serious medical need. Although the Washington Supreme Court has not defined "serious medical need," the United States Court of Appeals for the Ninth Circuit has recognized that a serious medical need is "[t]he existence of an injury that a reasonable doctor or patient would find important and worthy of comment or treatment; the presence of a medical condition that significantly affects an individual's daily activities; or the existence of chronic and substantial pain." McGuckin v. Smith, 974 F.2d 1050, 1059–60 (9th Cir. 1992), overruled on other grounds by WMX Techs., Inc. v. Miller, 104 F.3d 1133 (9th Cir. 1997) (en banc). A "serious" medical need is not confined to a horrific situation involving pain that is tantamount to "physical torture or a lingering death." Estelle v. Gamble, 429 U.S. 97, 103, 97 S.Ct. 285, 50 L.Ed.2d 251 (1976).

If the injury or illness would result in further significant injury or unnecessary and pointless infliction of pain if not treated, it is serious. Estelle v. Gamble, 429 U.S. at 103; Lopez v. Smith, 203 F.3d 1122, 1131–32 (9th Cir. 2000) (en banc), overruled on other grounds in WMX Techs., Inc. v. Miller, 104 F.3d at 1135–36; Hunt v. Dental Dep't, 865 F.2d 198, 200–01 (9th Cir. 1989); see also, Comment, Eighth Cir. Civ. Jury Instr. 4.43 (last updated 2017) (suggesting that serious medical need should be defined for the jury); see also Gayton v. McCoy, 593 F.3d

610, 620 (7th Cir. 2010); Johnson v. Busby, 953 F.2d 349 (8th Cir. 1991); Boring v. Kozakiewicz, 833 F.2d 468, 473–74 (3rd Cir. 1987).

[Current as of September 2018.]

WPI 343.05

CONDITIONS OF CONFINEMENT/FAILURE TO PROTECT—EIGHTH AMENDMENT—BURDEN OF PROOF ON THE ISSUES

(Name of plaintiff) **claims that** (name of defendant) **subjected** (name of plaintiff) **to a deprivation of [his] [her] Eighth Amendment constitutional right to be reasonably protected from substantial risk of serious harm while confined.**

(Name of plaintiff) **has the burden of proving each of the following propositions:**

(1) That (name of plaintiff) **was imprisoned under conditions that exposed [him] [her] to a substantial risk of serious harm;**

(2) That (name of defendant) **was deliberately indifferent to a known or obvious substantial risk of serious harm faced by** (name of plaintiff)**;**

(3) That (name of defendant) **was acting under color of law; and**

(4) That (name of defendant)'s **actions or failure to take action [proximately] caused injury or damage to** (name of plaintiff).

If you find from your consideration of all the evidence that each of these propositions has been proved, then your verdict should be for (name of plaintiff) **[on this claim]. On the other hand, if any of these propositions has not been proved, then your verdict should be for** (name of defendant) **[on this claim].**

NOTE ON USE

Use this instruction for Eighth Amendment claims involving safety needs of incarcerated persons who have been convicted of a crime.

In Fourteenth Amendment failure to protect cases, use WPI 343.07

(Conditions of Confinement/Failure to Protect—Fourteenth Amendment—Burden of Proof on the Issues) instead of this instruction.

Use this instruction with WPI 340.01 (Claims Instruction for Section 1983 Cases) and WPI 340.03 (Civil Rights—"Under Color of Law"—Definition). Use this instruction in place of WPI 340.02 (Civil Rights—Individual Defendant—Burden of Proof on the Issues).

If there are genuine issues of material fact concerning deliberate indifference, use WPI 343.06 (Conditions of Confinement—Eighth Amendment—Deliberate Indifference—Failure to Protect) with this instruction. Do not use WPI 341.04 (Civil Rights—Failure to Train or Inadequate Training—Municipal Liability—"Deliberate Indifference"—Definition) with this instruction.

For discussions of causation and the bracketed word "proximately," see the Comments to WPI 340.02 (Civil Rights—Individual Defendant—Burden of Proof on the Issues), WPI 340.04 (Civil Rights—"Subjects" and "Causes to be Subjected"—Definition), and WPI 340.06 (Causation—Comment Only).

Use this instruction with WPI 21.01 (Meaning of Burden of Proof—Preponderance of the Evidence).

For general conditions of confinement claims brought under the Eighth Amendment, use WPI 343.01 (General Conditions of Confinement—Eighth Amendment—Burden of Proof on the Issues) instead of this instruction. For general conditions of confinement claims brought under the Fourteenth Amendment, see the Comment to WPI 343.00 (Introduction—Conditions of Confinement—Eighth Amendment and Fourteenth Amendment).

For medical claims brought under the Eighth Amendment, use WPI 343.03 (Conditions of Confinement/Medical Care—Eighth Amendment—Burden of Proof on the Issues) instead of this instruction. For medical claims brought under the Fourteenth Amendment, see the Comment to WPI 343.00 (Introduction—Conditions of Confinement—Eighth Amendment and Fourteenth Amendment).

COMMENT

Prior to this edition, this instruction was designated as WPI 343.03. This instruction now applies only to claims under the Eighth Amendment.

See the Comment to WPI 343.00 (Introduction—Conditions of Confinement—Eighth Amendment and Fourteenth Amendment) for a discussion of this and other Eighth and Fourteenth Amendment conditions of confinement claims.

Convicted prisoner failure to protect claims. The Eighth Amendment requires that prison officials "take reasonable measures to guarantee the safety of the inmates." Farmer v. Brennan, 511 U.S. 825, 832, 114 S.Ct. 1970, 128 L.Ed.2d 811 (1994). To prove a violation of the Eighth Amendment in a failure to protect case a plaintiff must show that the defendant: (1) exposed plaintiff to a substantial risk of serious harm; and (2) was deliberately indifferent to plaintiff's constitutional rights. Farmer v. Brennan, 511 U.S. 825, 837, 114 S.Ct. 1970, 128 L.Ed.2d 811 (1994).

If some or all of the allegations are that the defendant did not directly take action or fail to take action regarding the risks alleged by plaintiff, but instead the defendant caused the plaintiff to be harmed by deliberate indifference because of the acts or omissions of others under official policies, the instruction will need to be modified accordingly.

Pretrial detainee failure to protect claims. When a "failure to protect" claim is based on events that happen after arrest but before judgment and sentence are entered, the Ninth Circuit Court of Appeals has adopted a purely objective deliberate indifference standard. Castro v. County of Los Angeles, 833 F.3d 1060, 1068–71 (9th Cir. 2016), cert. denied 137 S.Ct. 831 (2017) (overruling Clouthier v. County of Contra Costa, 591 F.3d 1232, 1241–44 (9th Cir. 2010)). See also Darnell v. Piniero, 849 F.3d 17, 35–36 (2nd Cir. 2017) (applying an objective standard of intent to all Fourteenth Amendment pretrial detainee claims). The Fifth Circuit, however, continues to apply a subjective deliberate indifference to Fourteenth Amendment pretrial detainee failure to protect claims. Alderson v. Concordia Parish Correctional Facility, 848 F.3d 415, 419–20 (5th Cir. 2017).

See WPI 343.07 (Conditions of Confinement/Failure to Protect—Fourteenth Amendment—Burden of Proof on the Issues) for the appropriate instruction in a Fourteenth Amendment failure to protect claim if the trial court has decided to apply the Ninth Circuit objective standard of intent.

[Current as of September 2018.]

WPI 343.06

CONDITIONS OF CONFINEMENT—EIGHTH AMENDMENT—DELIBERATE INDIFFERENCE—FAILURE TO PROTECT

"Deliberate indifference," as used in these instructions, means:

(1) The defendant was aware of a substantial risk that the plaintiff would be seriously harmed, and

(2) The defendant consciously failed or refused to take reasonable steps to address the substantial risk of serious harm.

Negligence or inadvertence alone does not constitute deliberate indifference.

Mere suspicion of a substantial risk of serious harm is not enough to prove that the defendant was aware of such risk. On the other hand, the plaintiff is not required to prove that the defendant believed it was absolutely certain that the specific type of serious harm was going to occur at a given place and a certain time in order to prove that defendant was aware of such risk.

[In your determination of whether any steps taken by the [prison] [jail] officials were reasonable, you may consider: whether the [prison] [jail] official(s) considered safety to other inmates, whether the [prison] [jail] official(s) took measures to protect the plaintiff, and whether there were any less dangerous alternative arrangements available] [and] [other circumstances relevant to the question of reasonableness].

NOTE ON USE

Use this instruction as the definition for deliberate indifference for an Eighth Amendment claim that the defendant failed to address a significant risk of serious harm to plaintiff from a dangerous condition of confinement while the plaintiff was in custody after conviction.

Use this instruction with WPI 340.01 (Claims Instruction for Section 1983 Cases); WPI 340.03 (Civil Rights—"Under Color of Law"—Definition); WPI 340.04 (Civil Rights—"Subjects" and "Causes to be Subjected"—Definition); WPI 343.05 (Conditions of Custody—Eighth Amendment—Failure to Protect—Burden of Proof on the Issues). Use the bracketed language as applicable.

Do not use WPI 341.04 (Civil Rights—Failure to Train or Inadequate Training—Municipal Liability—Deliberate Indifference—Definition) as the definition of deliberate indifference, unless there is an issue about failure to train or inadequate training, in the context of a cause of action against municipal defendant or other local government defendant.

For general conditions of confinement claims brought under the Eighth Amendment, use WPI 343.02 (Conditions of Confinement—Eighth Amendment—Deliberate Indifference—General Conditions of Confinement) instead of this instruction.

For medical claims brought under the Eighth Amendment, use WPI 343.04 (Conditions of Confinement—Eighth Amendment—Deliberate Indifference—Medical) instead of this instruction.

COMMENT

Prior to this edition, this instruction was designated as WPI 343.04. This instruction now applies only to claims under the Eighth Amendment.

See the Comment to WPI 343.00 (Introduction—Conditions of Confinement—Eighth Amendment and Fourteenth Amendment) for a discussion of this and other Eighth and Fourteenth Amendment conditions of confinement claims.

The instruction is based on: Farmer v. Brennan, 511 U.S. 825, 837–38, 114 S.Ct. 1970, 128 L.Ed.2d 811 (1994); Helling v. McKinney, 509 U.S. 25, 33–36, 113 S.Ct. 2475, 125 L.Ed.2d 22 (1993); Wilson v. Seiter, 501 U.S. 294, 303–06, 111 S.Ct. 2321, 115 L.Ed.2d 271(1991); Estelle v. Gamble, 429 U.S. 97, 97 S.Ct. 285, 50 L.Ed.2d 251 (1976); Estate of Ford v. Ramirez-Palmer, 301 F.3d 1043, 1049–52 (9th Cir. 2002); Robinson v. Prunty, 249 F.3d 862 (9th Cir. 2001); Redman v. County of San Diego, 942 F.2d 1435 (9th Cir. 1991); and Berg v. Kincheloe, 794 F.2d 457, 459–62 (9th Cir. 1986).

[Current as of September 2018.]

WPI 343.07

CONDITIONS OF CONFINEMENT/FAILURE TO PROTECT—FOURTEENTH AMENDMENT—BURDEN OF PROOF ON THE ISSUES

(Name of plaintiff) **claims that** (name of defendant) **subjected** (name of plaintiff) **to a deprivation of [his] [her] Fourteenth Amendment constitutional right to be reasonably protected from substantial risk of serious harm while confined.**

(Name of plaintiff) **has the burden of proving each of the following propositions:**

(1) That (name of defendant) **made an intentional decision with respect to the conditions under which the plaintiff was confined;**

(2) That those conditions put the plaintiff at substantial risk of suffering serious harm;

(3) That (name of defendant) **did not take reasonably available measures to [abate] [reduce or eliminate] that risk, even though a reasonable officer in the circumstances would have appreciated the high degree of risk involved—making the** (name of defendant)'s **conduct objectively unreasonable and the consequences of that conduct obvious;**

(4) That (name of defendant) **was acting under color of law; and**

(5) That (name of defendant)'s **actions or failure to take action [proximately] caused injury or damage to** (name of plaintiff).

If you find from your consideration of all the evidence that each of these propositions has been proved, then your verdict should be for (name of plaintiff) **[on this claim]. On the other hand, if any of these propositions has not been**

proved, then your verdict should be for (name of defendant) **[on this claim].**

NOTE ON USE

If the trial court has decided to apply the Ninth Circuit objective intent standard, use this instruction for Fourteenth Amendment claims involving safety needs of incarcerated persons who have not yet been convicted and sentenced of a crime.

For Eighth Amendment failure to protect claims and when the trial court has decided to apply the subjective deliberate indifference standard to a Fourteenth Amendment failure to protect claim, use WPI 343.05 (Conditions of Confinement/Failure to Protect—Eighth Amendment—Burden of Proof on the Issues) instead of this instruction.

Use one of the two bracketed alternatives in subdivision (3). The WPI Committee believes that the two alternatives have the same meaning.

Use this instruction with WPI 340.01 (Claims Instruction for Section 1983 Cases) and WPI 340.03 (Civil Rights—"Under Color of Law"—Definition). Use this instruction in place of WPI 340.02 (Civil Rights—Individual Defendant—Burden of Proof on the Issues).

For discussions of causation and the bracketed word "proximately," see the Comments to WPI 340.02 (Civil Rights—Individual Defendant—Burden of Proof on the Issues), WPI 340.04 (Civil Rights—"Subjects" and "Causes to be Subjected"—Definition), and WPI 340.06 (Causation—Comment Only).

Use this instruction with WPI 21.01 (Meaning of Burden of Proof—Preponderance of the Evidence).

For general conditions of confinement claims brought under the Eighth Amendment, use WPI 343.01 (General Conditions of Confinement—Eighth Amendment—Burden of Proof on the Issues) instead of this instruction. For general conditions of confinement claims brought under the Fourteenth Amendment, see the Comment to WPI 343.00 (Introduction—Conditions of Confinement—Eighth Amendment and Fourteenth Amendment).

For medical claims brought under the Eighth Amendment, use WPI 343.03 (Conditions of Confinement/Medical Care—Eighth Amendment—Burden of Proof on the Issues) instead of this instruction. For medical claims brought under the Fourteenth Amendment, see the Comment to WPI 343.00 (Introduction—Conditions of Confinement—Eighth Amendment and Fourteenth Amendment).

COMMENT

This instruction is new for this edition. See the Comment to WPI 343.00 (Introduction—Conditions of Confinement—Eighth Amendment and Fourteenth Amendment) for a discussion of this and other Eighth and Fourteenth Amendment conditions of confinement claims.

When a "failure to protect" claim is based on events that happen after arrest but before conviction and sentencing, the Ninth Circuit Court of Appeals has adopted a purely objective deliberate indifference standard. Castro v. County of Los Angeles, 833 F.3d 1060, 1068–71 (9th Cir. 2016), cert. denied 137 S.Ct. 831 (2017) (overruling Clouthier v. County of Contra Costa, 591 F.3d 1232, 1241–44 (9th Cir. 2010)). See also Darnell v. Piniero, 849 F.3d 17, 35–36 (2nd Cir. 2017) (applying the objective standard of intent to all pretrial detainee conditions of confinement claims). The Fifth Circuit, however, continues to apply a subjective deliberate indifference to Fourteenth Amendment pretrial detainee failure to protect claims. Alderson v. Concordia Parish Correctional Facility, 848 F.3d 415, 419–20 (5th Cir. 2017).

This instruction is drawn directly from *Castro*. Under the *Castro* objective standard, the issue for the jury is "[w]as there a substantial risk of serious harm to the plaintiff that could have been eliminated through reasonable and available measures that the officer did not take, thus causing the injury that the plaintiff suffered?" Castro v. County of Los Angeles, 833 F.3d at 1070. A pretrial detainee need not prove subjective elements about the officer's actual awareness of the level of risk. Castro v. County of Los Angeles, 833 F.3d at 1071. At the same time, however, the Supreme Court has instructed that "mere lack of due care by a state official" does not "deprive an individual of life, liberty, or property under the Fourteenth Amendment." Castro v. County of Los Angeles, 833 F.3d at 1071, quoting Daniels v. Williams, 474 U.S. 327, 330–31, 106 S.Ct. 662, 88 L.Ed.2d 662 (1986).

[Current as of September 2018.]

WPI 343.08

CONDITIONS OF CONFINEMENT—EIGHTH AMENDMENT—EXCESSIVE FORCE—BURDEN OF PROOF ON THE ISSUES

(Name of plaintiff) **claims that** (name of defendant) **subjected** (name of plaintiff) **to a deprivation of [his] [her] Eighth Amendment constitutional right to be free from cruel and unusual punishment while incarcerated.**

(Name of plaintiff) **has the burden of proving each of the following propositions:**

(1) That (name of plaintiff) **was [imprisoned] [in custody] and** (name of defendant) **used force against [him] [her];**

(2) That (name of defendant's) **use of force against** (name of plaintiff) **was excessive and unnecessary;**

(3) That (name of defendant) **used force maliciously and sadistically for the purpose of causing harm [and not in a good faith effort to achieve a legitimate purpose];**

(4) That (name of defendant) **was acting under color of law; and**

(5) That (name of defendant's) **actions [proximately] caused injury or damage to** (name of plaintiff).

In determining whether (name of defendant) **used excessive and unnecessary force in this case, consider all of the circumstances known to the officer[s] on the scene [including but not limited to:**

(1) The need to use force;

(2) The balance between the purpose for which (name of defendant) **used force and the amount of force employed to serve that purpose;**

(3) Whether (name of plaintiff) **reasonably appeared to pose an immediate threat to** (name of defendant) **or others;**

(4) Any efforts that were made to temper the severity of the force;

(5) Extent of injury.]

A small or insignificant injury does not, standing alone, prove that the force was or was not excessive.

NOTE ON USE

Use this instruction for an Eighth Amendment claim involving force used by corrections officers or other state officials.

Modify this instruction for an excessive force claim made by an inmate who has not been convicted and sentenced. See the Comment below for a discussion of the standards applicable to pre-conviction detention.

Use this instruction with WPI 340.01 (Claims Instruction for Section 1983 Cases) and WPI 340.03 (Civil Rights—"Under Color of Law"—Definition). Use this instruction in place of WPI 340.02 (Civil Rights—Individual Defendant—Burden of Proof on the Issues).

For discussions of causation and the bracketed word "proximately," see the Comments to WPI 340.02 (Civil Rights—Individual Defendant—Burden of Proof on the Issues), WPI 340.04 (Civil Rights—"Subjects" and "Causes to be Subjected"—Definition), and WPI 340.06 (Causation—Comment Only).

Use this instruction with WPI 21.01 (Meaning of Burden of Proof—Preponderance of Evidence).

COMMENT

Prior to this edition, this instruction was designated as WPI 343.05. The instruction has been revised for this edition.

See the Comment to WPI 343.00 (Introduction—Conditions of

Confinement—Eighth Amendment and Fourteenth Amendment) for a discussion of this and other Eighth and Fourteenth Amendment conditions of confinement claims.

The Eighth Amendment prohibits cruel and unusual punishment in prison; a prison official violates the Eighth Amendment if he or she uses force maliciously and sadistically for the purpose of causing harm, regardless of the degree of harm actually inflicted. Wilkins v. Gaddy, 559 U.S. 34, 130 S.Ct. 1175, 175 L.Ed.2d 995 (2010); Hudson v. McMillian, 503 U.S. 1, 4, 112 S.Ct. 995, 117 L.Ed.2d 156 (1992). The plaintiff must show that the use of force is of a sort "repugnant to the conscience of mankind", or that his or her injuries were more than de minimis. Wilkins v. Gaddy, 559 U.S. at 37–38.

Likewise, the Supreme Court has applied this standard to use of force during a prison riot: "whether force was applied in a good faith effort to maintain or restore discipline or maliciously and sadistically for the very purpose of causing harm." Whitley v. Albers, 75 U.S. 312, 320–21, 106 S.Ct. 1078, 89 L.Ed.2d 251 (1986), abrogated on other grounds in Wilkins v. Gaddy, 559 U.S. 34.

Factors listed for consideration by the jury are similar to those described in Ninth Circuit Pattern Civil Instruction 9.26 (2007).

If some or all of the allegations are that the defendant did not directly take action or fail to take action regarding the risks alleged by plaintiff, but instead defendant caused the plaintiff to be harmed by deliberate indifference because of the acts or omissions of others under official policies, the instruction will need to be modified accordingly.

Excessive force claims prior to conviction and sentencing. Claims of excessive force by inmates who have not been convicted and sentenced are analyzed under a Fourteenth Amendment objective reasonableness standard. Kingsley v. Hendrickson, ___ U.S. ___, 135 S.Ct. 2466, 2472–73, 192 L.Ed.2d 416 (2015). This instruction should be modified for use in a claim of excessive force under the Fourteenth Amendment.

The Fourth Amendment may also apply. In Graham v. Connor, 490 U.S. 386, 395 n.10, 109 S.Ct. 1865, 104 L.Ed.2d 443 (1989), the Supreme Court observed that it was an open question "whether the Fourth Amendment continues to provide individuals with protection against deliberate use of excessive physical force beyond the point at which arrest ends and pretrial detention begins." But with regard to pre-arraignment custody, the Ninth Circuit has held that the Fourth Amendment provides protection against the use of excessive force. Pierce v. Multnomah County, 76 F.3d 1032, 1043 (9th Cir. 1996). If the court finds that a Fourth Amendment claim is viable, see WPI 342.01 (Unrea-

sonable Force—Fourth Amendment—Burden of Proof on the Issues), WPI 342.02 (Definition of "Seizure" of a Person—Fourth Amendment), and WPI 342.03 (Definition of Unreasonable Force—Fourth Amendment) regarding the applicable pattern jury instruction.

[Current as of September 2018.]

CHAPTER 348

CIVIL RIGHTS—DAMAGES AND VERDICT FORMS

WPI 348.01 Civil Rights—Compensatory Damages (Reserved)
WPI 348.02 Civil Rights—Punitive Damages—Individual Defendant
WPI 348.10 Civil Rights—Fourth Amendment—Unreasonable Force—No Punitive Damages—Individual Defendant—Special Verdict Form
WPI 348.11 Civil Rights—Fourth Amendment—Unreasonable Force—Punitive Damages—Individual Defendant—Special Verdict Form
WPI 348.12 Civil Rights—Municipal Liability—Fourth Amendment—Unreasonable Force—No Punitive Damages—Special Verdict Form

WPI 348.01

CIVIL RIGHTS—COMPENSATORY DAMAGES (RESERVED)

COMMENT

The format of damage instructions such as WPI 30.01.01 (Measure of Economic and Noneconomic Damages—Personal Injury—No Contributory Negligence) can be adapted for use in a Section 1983 case.

As discussed in WPI 340.06 (Civil Rights—Causation—Comment Only), proof of compensatory damages requires proof of a causal link.

If the plaintiff's constitutional rights have been violated, the plaintiff is entitled to judgment and an award of at least nominal damages. Carey v. Piphus, 435 U.S. 247, 266–67, 98 S.Ct. 1042, 55 L.Ed.2d 252 (1978); Yniguez v. Arizonans for Official English, 69 F.3d 920 (9th Cir. 1995), reversed due to mootness, 520 U.S. 43, 117 S.Ct. 1055, 137 L.Ed.2d 170 (1997).

[Current as of September 2018.]

WPI 348.02

CIVIL RIGHTS—PUNITIVE DAMAGES—INDIVIDUAL DEFENDANT

If you find for (name of plaintiff), **and if you award compensatory or nominal damages, you may also award punitive damages. You are not required to do so. The purpose of punitive damages is not to compensate a plaintiff but rather to punish a defendant and to deter a defendant and others from committing similar acts in the future.**

(Name of plaintiff) **has the burden of proving that punitive damages should be awarded. You may award punitive damages only if you find that** (name of defendant)'s **conduct (1) was motivated by evil motive or intent, or (2) involved reckless or callous indifference to the rights of others.**

(Name of plaintiff) **also has the burden of proving the amount of punitive damages that should be awarded. If you find that punitive damages are appropriate, you must use reason in setting the amount. Punitive damages, if any, should be in an amount sufficient to fulfill the purposes stated above, but should not reflect bias, prejudice, or sympathy toward any party. The amount of any punitive damages should also bear a reasonable relationship to any injury or harm actually or potentially suffered by** (name of plaintiff).

[Punitive damages may not be awarded against (fill in name(s) of any governmental entity or official capacity defendant).**] [You may impose punitive damages against one or more of the defendants and not others, and may award different amounts against different defendants.]**

NOTE ON USE

Use the first bracketed sentence if there is a municipal entity or defendant being sued in an official capacity, or if the court has ruled that punitive damages are not to be awarded against a particular defendant.

COMMENT

Punitive damages may be awarded against an individual defendant found guilty of federal civil rights violations when the jury finds that the defendant's behavior was driven by evil motive or intent or involved a reckless or callous indifference to constitutional rights. Smith v. Wade, 461 U.S. 30, 56, 103 S.Ct. 1625, 75 L.Ed.2d 632 (1983). Punitive damages cannot be awarded against municipal defendants. City of Newport v. Fact Concerts, Inc., 453 U.S. 247, 101 S.Ct. 2748, 69 L.Ed.2d 616 (1981).

Although Washington common law does not authorize punitive damages, punitive damages may nonetheless be awarded in Section 1983 cases involving Washington defendants, either in federal court, see Davis v. Mason County, 927 F.2d 1473 (9th Cir.1991), overruled on other grounds in Davis v. City of San Francisco, 976 F.2d 1536 (9th Cir. 1992), or in state court, Peterson v. Littlejohn, 56 Wn.App. 1, 781 P.2d 1329 (1989).

In Sintra, Inc. v. Seattle, 131 Wn.2d 640, 935 P.2d 555 (1997), a Section 1983 case, the Supreme Court approved of the trial court's instructions on punitive damages as appropriately focusing on the discretionary nature of such an award and the purposes to be served. Citing to Pacific Mutual Life Insurance Co. v. Haslip, 499 U.S. 1, 111 S.Ct. 1032, 113 L.Ed.2d 1 (1991), and Morgan v. Woessner, 997 F.2d 1244 (9th Cir. 1993), the court observed that such instructions "should be fashioned to describe the proper purposes of punitive damages, so that the jury understands punitive damages are not to compensate the plaintiff, but to punish the defendant and to deter the defendant and others from such conduct in the future." Sintra, Inc. v. Seattle, 131 Wn.2d at 662.

There may be circumstances when the jury instruction concerning punitive damages must include a description of the concept of "oppressive" conduct—i.e., an act or omission that is unnecessarily harsh or severe and is a misuse or abuse of authority or power, or an act or omission that shows the defendant was taking advantage of a weakness, disability or misfortune of another person. In a specific case, such language may be necessary to fully inform the jury of the plaintiff's theory of punitive damages. See Dang v. Cross, 422 F.3d 800, 804–11 (9th Cir. 2005) (reversing the punitive damages verdict because the jury instruction did not include the plaintiff's proposed language concerning oppressive acts and omissions; the Ninth Circuit held that oppressiveness is a third category under Smith v. Wade, 461 U.S. 30, 103 S.Ct. 1625, 75 L.Ed.2d 632 (1983) and the jury instruction was incomplete as a matter of law).

The United States Supreme Court has addressed in depth the due

process standards to be applied in post-verdict review of punitive damage awards. See Phillip Morris USA v. Williams, 549 U.S. 346, 127 S.Ct. 1057, 166 L.Ed.2d 940 (2007); State Farm Mut. Auto. Ins. Co. v. Campbell, 538 U.S. 408, 123 S.Ct. 1513, 155 L.Ed.2d 585 (2003); Cooper Indus., Inc. v. Leatherman Tool Group, Inc., 532 U.S. 424, 121 S.Ct. 1678, 149 L.Ed.2d 674 (2001); BMW of N. Am., Inc. v. Gore, 517 U.S. 559, 116 S.Ct. 1589, 134 L.Ed.2d 809 (1996).

These cases have steadfastly avoided the articulation of any "rigid benchmarks" for assessing punitive damages awards. They have, however, discussed various "guideposts" with which the practitioner should be familiar, not just for their relevance to the sustainability of an award but also for their implications as to the admissibility of evidence. One of those guideposts is "the disparity between the actual or potential harm suffered by the plaintiff and the punitive damages award." State Farm Mut. Auto. Ins. Co. v. Campbell, 538 U.S. 408, 123 S.Ct. 1513, 155 L.Ed.2d 585 (2003). Accordingly, the WPI Committee deems it prudent to include a "reasonable relationship" factor in general terms, giving counsel latitude to argue its application. See the Comment to WPI 35.01 (Exemplary or Punitive Damages).

[Current as of September 2018.]

WPI 348.10

CIVIL RIGHTS—FOURTH AMENDMENT—UNREASONABLE FORCE—NO PUNITIVE DAMAGES—INDIVIDUAL DEFENDANT—SPECIAL VERDICT FORM

(Insert caption.)

We, the jury, answer the questions submitted by the court as follows:

[QUESTION 1: Did (identify person) **subject the plaintiff to a deprivation of [his] [her] Fourth Amendment rights by using [or] [failing to intervene to prevent or stop the use of] unreasonable force?]**

[QUESTION 1: Did (identify person who allegedly supervised others) **cause the plaintiff to be subjected to a deprivation of [his] [her] Fourth Amendment rights by:**

Taking action, or failing to act, when (identify person who allegedly supervised others) **knew or reasonably should have known that this would cause others to use unreasonable force against plaintiff, and thereby** (identify person who allegedly supervised others) **set in motion a series of acts by those [he] [she] supervised, that resulted in the use of unreasonable force?]**

ANSWER: _____ (Write "yes" or "no")

(DIRECTION:

- *If you answered "no" to Question 1, do not answer any other questions; sign this verdict form.*
- *If you answered "yes" to Question 1, answer Question 2.)*

QUESTION 2: Was the unreasonable force a [proximate] cause of injury or damage?

ANSWER: _____ (Write "yes" or "no")

(DIRECTION:

- *If you answered "no" to Question 2, do not answer any other questions; sign this verdict form.*
- *If you answered "yes" to Question 2, answer Question 3.)*

QUESTION 3: What do you find to be (name of plaintiff's) **amount of damages?**

ANSWER: $_____

(DIRECTION: Sign this verdict form and notify the bailiff.)

DATE: _____ _____

Presiding Juror

NOTE ON USE

This instruction, adapted appropriately, is used when the plaintiff makes allegations that the defendant used unreasonable force and violated the Fourth Amendment rights of the plaintiff. This verdict form is only for causes of action against a defendant who is being sued in his or her individual capacity; this instruction should be combined with instructions drawn from WPI Chapters 340 (Civil Rights—General Introductory Instructions) and 342 (Civil Rights—Fourth Amendment—Unreasonable Search and Seizure), as appropriate to the particular facts. If punitive damages are being requested, practitioners should use WPI 348.11 (Civil Rights—Fourth Amendment—Unreasonable Force—Punitive Damages—Individual Defendant—Special Verdict Form) instead of this instruction.

This instruction is intended for use in a civil rights action under Section 1983. Causes of action under Sections 1981 (contractual issues) and 1985 (conspiracy) are not addressed in these instructions. See WPI 340.00 (Civil Rights—Introduction).

Select the bracketed material, as applicable. Question 1 has two

alternatives: the first is for a defendant who was not supervising others and allegedly caused the deprivation of Fourth Amendment rights in a direct way. The second alternative applies if the defendant allegedly caused the plaintiff to be subjected to the unreasonable force, i.e., the defendant was a supervisor who indirectly caused the deprivation of Fourth Amendment rights by directing or failing to halt the ongoing acts of employees.

If the plaintiff has Section 1983 claims against local governmental entities, or individuals acting in their official capacities, then: use the municipal liability verdict form, WPI 348.12 (Civil Rights—Municipal Liability—Fourth Amendment—Unreasonable Force—No Punitive Damages—Special Verdict Form); adapt the instructions from WPI Chapters 340 (Civil Rights—General Introductory Instructions) and 342 (Civil Rights—Fourth Amendment—Unreasonable Search and Seizure) as appropriate; and combine these instruction with applicable instructions from WPI Chapter 341 (Civil Rights—Municipal and Local Government Liability). See WPI 340.00 (Civil Rights—Introduction).

The word "proximate" is bracketed in Question 2. Instructions on causation must be carefully tailored to the specific case. For a discussion of causation issues, see the Comments to WPI 340.06 (Civil Rights—Causation—Comment Only), 340.02 (Civil Rights—Individual Defendant—Burden of Proof on the Issues), and 340.04 (Civil Rights—"Subjects" and "Causes to be Subjected"—Definition).

In paragraph (1), practitioners will need to clearly identify the constitutional claim at issue. Insert a reference to acting under color of law if that is a contested issue in the case, combined with WPI 340.03 (Civil Rights—"Under Color of Law"—Definition).

If the case contains another type of claim, such as an action in tort, care should be taken to label the civil rights or Section 1983 instructions as such.

If the case involves counter-claims, cross-claims, or third party claims see WPI 41.05 (Counterclaim—Cross-Claim—Third-Party Claim).

COMMENT

For a discussion of causation issues, see the Comments to WPI 340.06 (Civil Rights—Causation—Comment Only), WPI 340.02 (Civil Rights—Individual Defendant—Burden of Proof on the Issues), and WPI 340.04 (Civil Rights—"Subjects" and "Causes to be Subjected"—Definition).

[Current as of September 2018.]

WPI 348.11

CIVIL RIGHTS—FOURTH AMENDMENT—UNREASONABLE FORCE—PUNITIVE DAMAGES—INDIVIDUAL DEFENDANT—SPECIAL VERDICT FORM

(Insert caption.)

We, the jury, answer the questions submitted by the court as follows:

[QUESTION 1: Did (identify person) **use [fail to intervene to prevent or stop the use of] unreasonable force?]**

[QUESTION 1: Did (identify person who allegedly supervised others) **cause** (name of plaintiff) **to be subjected to a deprivation of [his] [her] Fourth Amendment rights by:**

Taking action, or failing to act, when (identify person who allegedly supervised others) **knew or reasonably should have known that this would cause others to use unreasonable force against** (name of plaintiff)**, and thereby** (identify person who allegedly supervised others) **set in motion a series of acts by those [he] [she] supervised, that resulted in the use of unreasonable force?]**

ANSWER: _____ (Write "yes" or "no")

(DIRECTION:

- *If you answered "no" to Question 1, do not answer any other questions; sign this verdict form.*
- *If you answered "yes" to Question 1, answer Question 2.)*

QUESTION 2: Was the unreasonable force a [proximate] cause of injury or damage?

ANSWER: _____ (Write "yes" or "no")

(DIRECTION:

- *If you answered "no" to Question 2, do not answer Question 3; skip ahead to Question 4.*
- *If you answered "yes" to Question 2, answer Question 3.)*

QUESTION 3: What do you find to be (name of plaintiff)**'s amount of damages?**

ANSWER: $_____

(DIRECTION: Proceed to Question 4.)

QUESTION 4: When considering whether to impose punitive damages, please answer these questions:

(a) Did (name of defendant) **act, or fail to act, with an evil motive or intent?**

ANSWER: _____ (Write "yes" or "no")

(b) Did (name of defendant) **act, or fail to act, with reckless or callous indifference to the plaintiff's federally protected rights?**

ANSWER: _____ (Write "yes" or "no")

(DIRECTION:

- *If you answered "no" to both Question(s) 4(a) and 4(b), do not answer Question 5; sign this verdict form.*
- *If you answered "yes" to Question 4 (a) or Question 4(b), or to both, answer Question 5.)*

QUESTION 5: What do you find to be the amount of the punitive damages, if any?

ANSWER: $_____

(DIRECTION: Sign this verdict form and notify the bailiff.)

DATE: _____ _____

Presiding Juror

NOTE ON USE

This instruction is an alternative to WPI 348.10 (Civil Rights—Fourth Amendment—Unreasonable Force—No Punitive Damages—Individual Defendant—Special Verdict Form) for use in cases in which punitive damages are being requested.

For further discussion of the use of this verdict form, see the Note on Use to WPI 348.10 (Civil Rights—Unreasonable Force—Special Verdict Form).

[Current as of September 2018.]

WPI 348.12

CIVIL RIGHTS—MUNICIPAL LIABILITY—FOURTH AMENDMENT—UNREASONABLE FORCE—NO PUNITIVE DAMAGES—SPECIAL VERDICT FORM

(Insert caption.)

We, the jury, answer the questions submitted by the court as follows:

QUESTION 1: Was (name of plaintiff) **subjected to the use of unreasonable force in deprivation of [his] [her] Fourth Amendment rights?**

ANSWER: _____ (Write "yes" or "no")

(DIRECTION:

- *If you answered "no" to Question 1, do not answer any other questions; sign this verdict form.*
- *If you answered "yes" to Question 1, answer Question 2.)*

QUESTION 2: Was an official policy of (identify municipality or other entity) **a moving force that led to this deprivation of** (name of plaintiff)**'s Fourth Amendment rights?**

ANSWER: _____ (Write "yes" or "no")

(DIRECTION:

- *If you answered "no" to Question 2, do not answer any other questions; sign this verdict form.*
- *If you answered "yes" to Question 2, answer Question 3.)*

QUESTION 3: Was the unreasonable force a [proximate] cause of injury or damage?

ANSWER: _____ (Write "yes" or "no")

(DIRECTION:

- *If you answered "no" to Question 3, do not answer any other questions; sign this verdict form.*
- *If you answered "yes" to Question 3, answer Question 4.)*

QUESTION 4: What do you find to be the amount, if any, of (name of plaintiff)**'s damages?**

ANSWER: $_____

(DIRECTION: Sign this verdict form and notify the bailiff.)

DATE: _____ _____

Presiding Juror

NOTE ON USE

This special verdict form applies to cases involving a government entity's liability for the use of unreasonable force under the Fourth Amendment.

Select the appropriate bracketed phrases, depending upon the facts of the case. In some cases, the verdict form may need to be supplemented with additional questions, such as if there is a factual dispute about particular policies or customs.

This instruction is intended for use in a civil rights action under Section 1983, Title 42, U.S.C.A. Causes of action under Sections 1981 (contractual issues) and 1985 (conspiracy) are not addressed in these instructions. See WPI 340.00 (Civil Rights—Introduction).

For complex causation issues, additional language may be necessary. See the Note on Use and Comment to WPI 341.01 (Civil Rights—Municipal and Local Government Liability—General Introductory Instruction) concerning causation in a Section 1983 case against a municipality or other local government defendant. For further discussion, see also the Notes on Use and Comments to WPI 340.06 (Causation—Comment Only), WPI 340.02 (Civil Rights—Individual Defen-

dant—Burden of Proof on the Issues), and WPI 340.04 (Civil Rights—"Subjects" and "Causes to be Subjected"—Definition).

If the case contains another type of claim, such as an action in tort, care should be taken to label the civil rights or Section 1983 instructions as such.

If the case involves counter-claims, cross-claims, or third party claims, see WPI 41.05 (Counterclaim—Cross-Claim—Third-Party Claim).

[Current as of September 2018.]

PART XVIII

COMMERCIAL LITIGATION

CHAPTER 351 TRADE SECRETS

CHAPTER 352 TORTIOUS INTERFERENCE WITH ECONOMIC RELATIONS

CHAPTER 351

TRADE SECRETS

WPI 351.01 Trade Secrets—Burden of Proof
WPI 351.02 Trade Secret—Definition
WPI 351.03 Misappropriation—Definition
WPI 351.04 Improper Means—Definition
WPI 351.05 Independent Economic Value—Definition
WPI 351.06 Readily Ascertainable—Definition
WPI 351.07 Reverse Engineering—Definition
WPI 351.08 Reasonable Efforts to Maintain Secrecy—Definition

WPI 351.01

TRADE SECRETS—BURDEN OF PROOF

On the claim of misappropriated trade secrets, (name of plaintiff) has the burden of proving each of the following propositions:

(1) That (name of plaintiff) had a trade secret;

(2) That (name of defendant) misappropriated (name of plaintiff)'s trade secret; and

[(3) That (name of defendant)'s misappropriation was a proximate cause of damages to (name of plaintiff)];

[(3) That, as a result of the misappropriation, (name of defendant) received money or benefits that in justice and fairness belong to (name of plaintiff)].

If you find from your consideration of all the evidence that each of these propositions has been proved, then your verdict should be for (name of plaintiff) [on this claim]. On the other hand, if you find that any of these propositions has not been proved, your verdict should be for (name of defendant) [on this claim].

NOTE ON USE

Use this instruction in a trade secrets case not involving any affirmative defenses. For trade secrets cases having an affirmative defense, set forth the affirmative defense using WPI 21.05 (Burden of Proof on the Issues—Affirmative Defenses Other than Contributory Negligence/ Assumption of Risk).

This instruction includes alternative versions of the third element. Choose from between these two alternatives depending on whether the plaintiff claims actual damages or unjust enrichment. For a discussion of the alternative version for unjust enrichment, see the Comment below. If a plaintiff claims both damages and unjust enrichment, then the instruction will need to be modified in accordance with the discussion in the Comment below.

For a discussion of punitive damages, see the Comment below.

Use this instruction with WPI 351.02 (Trade Secret—Definition), WPI 351.03 (Misappropriation—Definition), and WPI 21.01 (Meaning of Burden of Proof—Preponderance of the Evidence).

When vicarious liability is an issue, this instruction may be used with the appropriate instruction from WPI Chapter 50 (Agency and Partnership). Agency and Partnership. For further discussion, see the Comment.

If needed, a "summary of claims" instruction may be drafted using WPI Chapter 20 (Issues in the Case), as modified to fit a trade secrets case.

COMMENT

Background. Washington adopted the Uniform Trade Secrets Act in 1981, with some variations from the Uniform Act. Washington has

not adopted the 1985 amendments to the Uniform Act. The Act is codified as RCW Chapter 19.108. For an extended discussion of the Uniform Act and its general principles, see Boeing Co. v. Sierracin Corp., 108 Wn.2d 38, 46–61, 738 P.2d 665 (1987).

"In the absence of legislative intent to the contrary, prior common law which is not contradicted by the Uniform Trade Secrets Act should continue to guide courts in the interpretation of the Act." Ed Nowogroski Ins., Inc. v. Rucker, 137 Wn.2d 427, 444–45, 971 P.2d 936 (1999). Nevertheless, courts should also construe the Washington statute with the objective of national uniformity when possible. Thola v. Henschell, 140 Wn.App. 70, 78, 164 P.3d 524 (2007).

Existence of trade secret. A plaintiff seeking damages for the misappropriation of a trade secret has the burden of proving that a legally protectable trade secret exists. Ed Nowogroski Ins., Inc. v. Rucker, 137 Wn.2d 427, 439, 971 P.2d 936 (1999); Boeing Co. v. Sierracin Corp., 108 Wn.2d 38, 49, 738 P.2d 665 (1987).

Multiple forms of damages. Under the Act, plaintiffs may recover actual damages, restitution for unjust enrichment, and punitive damages, with limitations noted below. RCW 19.108.030. The 1985 amendments to the Uniform Act added explicit provision for recovery of royalties, but Washington has not adopted that change.

Under the Act, a jury's verdict may combine recoveries for actual damages and unjust enrichment in a single case, but only to the extent that the award for unjust enrichment does not duplicate the recovery of actual damages. See RCW 19.108.030(1) ("A complainant also may recover unjust enrichment . . . that is not taken into account in computing damages for actual loss."). If both forms of damages are being presented to the jury, the instruction will need to be modified to clearly express this limitation. For example: "The law does not permit a plaintiff to recover twice for the same damages. Thus, you may include as damages *both* plaintiff's lost profits *and* defendant's gain *only* if and to the extent that they do not overlap in this way." Nelson & Fisher, Am. Bar Ass'n Section of Litigation, Model Jury Instructions: Business Torts Litigation § 8.6.2 (4th ed.).

Unjust enrichment. Washington courts have described the doctrine of unjust enrichment as the:

> [g]eneral principle that one person should not be permitted unjustly to enrich himself at expense of another, but should be required to make restitution of or for property or benefits received, retained or appropriated, where it is just and equitable that such restitution be made, and where such action involves no violation or frustration of law or opposition to public policy, either directly or indirectly.

> Unjust enrichment of a person occurs when he has and retains money or benefits which in justice and equity belong to another.

Bailie Commc'ns, Ltd. v. Trend Bus. Sys., Inc., 61 Wn.App. 151, 159, 810 P.2d 12, 814 P.2d 699 (1991) (quoting Black's Law Dictionary (6th ed. 1990)) (citations omitted). WPI 351.01 follows this approach but uses the word "fairness" instead of "equity" for better juror comprehension.

Under this unjust enrichment alternative, the Court of Appeals has held that, once the plaintiff proves sales attributable to the use of a trade secret, the burden shifts to the defendant to establish "any portion of the sales not attributable to the trade secret and any expenses to be deducted in determining net profits." Petters v. Williamson & Assocs., Inc., 151 Wn.App. 154, 165, 210 P.3d 1048 (2009) (quoting Restatement (Third) of Unfair Competition § 45, comment f (1995)). See also the Comment to WPI 301A.02 (Quasi Contract).

Punitive damages. The Act allows for the imposition of punitive damages. Under the Act, "[i]f wilful and malicious misappropriation exists, the court may award exemplary damages in an amount not exceeding twice any award [for actual damages and unjust enrichment]." RCW 19.108.030(2).

Pursuant to this statute, the amount of any punitive damages is determined by the judge, not the jury, after a threshold finding has been made as to willful and malicious misappropriation. Thola v. Henschell, 140 Wn.App. 70, 89, 164 P.3d 524 (2007) (trial court determines exemplary damages and fees in its discretion); see Unif. Trade Secrets Act with 1985 Amendments, § 3 comment, 14 U.L.A. (2005) (clarifying that "the court" in this context means the judge); Nelson & Fisher, Am. Bar Ass'n Section of Litigation, Model Jury Instructions: Business Torts Litigation § 8.7 (4th ed.).

The statute, however, is unclear as to whether the threshold finding of willful and malicious misappropriation in a jury case is to be made by the judge or the jury. Two Washington cases highlight this ambiguity, although in neither case was this issue directly addressed in the appellate opinion. In one case, the trial judge submitted the threshold factual finding to the jury and used that finding in deciding whether to impose punitive damages. Eagle Group, Inc. v. Pullen, 114 Wn.App. 409, 422, 58 P.3d 292 (2002). (A similar result occurred in Thola v. Henschell, 140 Wn.App. 70, 164 P.3d 524 (2007), but the award was reversed on appeal for other reasons.) In the other case, the parties agreed that the trial judge should decide both the threshold factual issue and the ensuing issue of the amount of any punitive damages. Boeing Co. v. Sierracin Corp., 108 Wn.2d 38, 61–62, 738 P.2d 665 (1987).

Because this issue is still unsettled, the instructions for a particu-

lar case will depend on who the judge determines should make the threshold finding. If the judge rules that "willful and malicious misappropriation" is to be determined by the jury rather than the judge, then the jurors should be given the following special interrogatory: "If you find that (name of defendant) misappropriated a trade secret, was this misappropriation willful and malicious?" If, however, the threshold issue is to be determined by the judge, then the jurors need not be instructed on punitive damages at all.

Separate damages instruction. A separate damages instruction will need to be drafted, using one of the instructions from WPI Chapter 30 (Personal and Property Damages), as a model, setting forth in greater detail the methods for calculating actual damages and unjust enrichment. The contents of this instruction will necessarily vary depending on the facts of each case.

Actual damages are generally calculated by measuring the plaintiff's lost profits, while unjust enrichment awards are generally calculated by measuring the defendant's ill-gotten profits. See Rosenhouse, Annotation, Proper Measure and Elements of Damages for Misappropriation of Trade Secret, 11 A.L.R.4th 12, § 2[a] (1982); Nelson & Fisher, Am. Bar Ass'n Section of Litigation, Model Jury Instructions: Business Torts Litigation § 8.6 (4th ed.). Actual damages include both past and future lost profits, as well as related expenses. Eagle Group, Inc. v. Pullen, 114 Wn.App. 409, 420–21, 58 P.3d 292 (2002) (also setting forth a damages instruction addressing actual damages).

Pre-emption issues. The Act does not displace other statutory or common law claims for misappropriation of intellectual property except to the extent that these remedies conflict with those provided by the Act. Boeing Co. v. Sierracin Corp., 108 Wn.2d 38, 48, 738 P.2d 665 (1987).

Federal copyright law does not pre-empt Washington state trade secret law claims. Boeing Co. v. Sierracin Corp., 108 Wn.2d at 49. However, the Act is the exclusive remedy for the misappropriation of trade secrets. Claims seeking recovery based on tort, restitution, or other legal theories must be supported by evidence of conduct other than the misappropriation of trade secrets. See Thola v. Henschell, 140 Wn.App. 70, 82, 85, 164 P.3d 524 (2007) (trial court erroneously failed to instruct jury that evidence of misappropriation of trade secrets could not be used to support common law claims).

Vicarious liability. In some cases, vicarious liability may be an issue. See Thola v. Henschell, 140 Wn.App. at 78–79 (vicarious liability is a general civil liability principle that is consistent with Uniform Trade Secrets Act).

Cross-reference. An extended, treatise-style discussion of the Uniform Trade Secrets Act can be found in another volume of Washington Practice. See DeWolf & Allen, 16A Washington Practice, Tort Law and Practice § 23:9 (4th ed.). The pre-emption issue is discussed in 16A Washington Practice § 23:10.

[Current as of September 2018.]

WPI 351.02

TRADE SECRET—DEFINITION

Washington law prohibits misappropriation of a trade secret. "Trade secret" means information, including a formula, pattern, compilation, program, device, method, technique, or process that:

(1) Derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable by proper means by, other persons who can obtain economic value from its disclosure or use; and

(2) Is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.

NOTE ON USE

This instruction defines a term used in WPI 351.01 (Trade Secrets—Burden of Proof). The following instructions should also be used: WPI 351.05 (Independent Economic Value—Definition) and WPI 351.08 (Reasonable Efforts to Maintain Secrecy—Definition).

COMMENT

The instruction is based on RCW 19.108.010.

While the definition of a trade secret is a matter of law under the Uniform Trade Secrets Act, the determination in a given case whether specific information is a trade secret is a factual question. Ed Nowogroski Ins., Inc. v. Rucker, 137 Wn.2d 427, 436, 971 P.2d 936 (1999); Woo v. Fireman's Fund Ins. Co., 137 Wn.App. 480, 487, 154 P.3d 236 (2007) (application of legal test is fact-specific).

Washington case law interpreting "trade secret." For a trade secret to exist, the underlying information must not be "readily ascertainable by proper means" from some other source, including the product itself. Boeing Co. v. Sierracin Corp., 108 Wn.2d 38, 49–50, 738 P.2d 665 (1987); Belo Management Services, Inc. v. Click! Network, 184 Wn.App. 649, 343 P.3d 370 (2014); Machen, Inc. v. Aircraft Design, Inc., 65 Wn.App. 319, 324–26, 828 P.2d 73 (1992), overruled on other grounds in Waterjet Tech., Inc. v. Flow Int'l Corp., 140 Wn.2d 313, 996 P.2d 598 (2000).

A compilation of information may constitute a trade secret even though the plaintiff cannot prove that every element of the compilation is unavailable elsewhere. Trade secrets frequently contain elements that by themselves may be in the public domain, but which together qualify as trade secrets. Boeing Co. v. Sierracin Corp., 108 Wn.2d at 50; Machen, Inc. v. Aircraft Design, Inc., 65 Wn.App. at 327. On the other hand, when the information is in the public domain, and the end product of the information is unoriginal, there is no trade secret. Woo v. Fireman's Fund Ins. Co., 137 Wn.App. at 488–89 (combination of public data must be novel and unique); Buffets, Inc. v. Klinke, 73 F.3d 965, 968 (9th Cir. 1996) (stating that a plaintiff must prove novelty to establish trade secret under Washington law); see West v. Port of Olympia, 146 Wn.App. 108, 120, 192 P.3d 926 (2008) (information "must be 'novel' in the sense that the information must not be readily ascertainable from another source").

"[W]hether a customer list is protected as a trade secret depends on three factual inquiries: (1) whether the list is a compilation of information; (2) whether it is valuable because unknown to others; and (3) whether the owner has made reasonable attempts to keep the information secret." Ed Nowogroski Ins., Inc. v. Rucker, 137 Wn.2d 427, 442, 971 P.2d 936 (1999).

The requirement of secrecy is not absolute so long as reasonable efforts have been taken to maintain secrecy. Kewanee Oil Co. v. Bicron Corp., 416 U.S. 470, 94 S.Ct. 1879, 40 L.Ed.2d 315 (1974); K-2 Ski Co. v. Head Ski Co., 506 F.2d 471, 474 (9th Cir. 1974); Machen, Inc. v. Aircraft Design, Inc., Machen, Inc. v. Aircraft Design, Inc., 65 Wn. App. 319, 327, 828 P.2d 73 (1992), overruled on other grounds, Waterjet Tech., Inc. v. Flow Int'l Corp., 140 Wn.2d 313, 996 P.2d 598 (2000).

Trade secrets are not lost merely by such factors as the passage of time, submission to a licensing agency for purposes of government certification, or confidential disclosures to such persons as employees or suppliers. Boeing Co. v. Sierracin Corp., 108 Wn.2d 38, 52, 738 P.2d 665 (1987). When the information is given out to employees without advising them of its confidentiality, or of measures to be taken to prevent its being obtained by others, security efforts may not be reasonable, even if the defendant actually obtains the information by improper means. Buffets, Inc. v. Klinke, 73 F.3d 965, 968 (9th Cir. 1996).

Criteria from other sources. Washington law has not addressed whether criteria set forth in the Restatement (First) of Torts continue to apply when determining the existence of a trade secret under the Uniform Act. The Restatement (First)'s criteria are: (1) the extent to which the information is known outside the business; (2) the extent to which it is known by employees and others involved in the business; (3)

the extent of measures taken to guard the secrecy of the information; (4) the value of the information to the business and to competitors; (5) the amount of effort or money expended in developing the information; and (6) the ease or difficulty with which the information could be properly acquired or duplicated by others. Restatement (First) of Torts § 757, cmt. b (1939) (section 757 was not included in subsequent Restatements of Torts, and trade secrets were instead defined in Restatement (Third) of Unfair Competition § 39 (1995)).

A number of other jurisdictions have continued to apply the Restatement (First)'s criteria when interpreting the Uniform Act. See cases collected in Unif. Trade Secrets Act with 1985 Amendments § 1, Notes of Decisions 6, 7, 8 & 42–97, 14 U.L.A (2005). For additional cases from other jurisdictions, see Gross, Annotation, What Is "Trade Secret" so as to Render Actionable under State Law its Use or Disclosure by Former Employee, 59 A.L.R.4th 641 (1988), and Zupanec, Annotation, Disclosure of Trade Secret as Abandonment of Secrecy, 92 A.L.R.3d 138 (1979).

The American Bar Association has proposed an instruction defining "trade secret" to include requirements of secrecy, reasonable measures to protect secrecy, and competitive advantage. Nelson & Fisher, Am. Bar Ass'n Section of Litigation, Model Jury Instructions: Business Torts Litigation § 8.3 (4th ed.).

[Current as of September 2018.]

WPI 351.03

MISAPPROPRIATION—DEFINITION

"Misappropriation" of a trade secret means acquisition, disclosure, or use of a trade secret without the express or implied consent of the owner of the trade secret by a person who:

[(1)] [Used improper means to acquire the trade secret;] [or]

[(2)] [At the time of acquisition, disclosure, or use, knew or had reason to know that his or her knowledge of the trade secret was:

[(a)] [derived from or through a person who had utilized improper means to acquire it;] [or]

[(b)] [acquired under circumstances giving rise to a duty to maintain its secrecy or limit its use;] [or]

[(c)] [derived from or through a person who owed a duty to the plaintiff to maintain its secrecy or limit its use;]] [or]

[(3)] [Before a material change of his or her position, knew or had reason to know that it was a trade secret and that knowledge of it had been acquired by accident or mistake.]

NOTE ON USE

This instruction defines a term used in the burden of proof instruction, WPI 351.01, which should accompany this instruction. When appropriate, use WPI 351.04 (Improper Means—Definition) with this instruction.

Use the bracketed material as applicable to the particular case and renumber accordingly.

COMMENT

This instruction is based on the language of RCW 19.108.010(2), as well as instructions submitted in Boeing Co. v. Sierracin Corp., 108 Wn.2d 38, 738 P.2d 665 (1987). The wording has in some places been simplified to increase juror understanding. No substantive departure from the statute is intended

Misappropriations are not limited to the physical or electronic taking of protected information. A misappropriation may also occur when a person memorizes trade secrets and later reveals them to others. Ed Nowogroski Ins., Inc. v. Rucker, 137 Wn.2d 427, 971 P.2d 936 (1999) (customer list).

A misappropriation may sometimes be based on a duty to maintain secrecy. RCW 19.108.010(2)(b). A confidential relationship imposes an obligation not to disclose a trade secret or use it for other purposes. Pacific Aerospace & Elecs., Inc. v. Taylor, 295 F.Supp.2d 1205, 1212 (E.D. Wash. 2003) (applying Washington law).

[Current as of September 2018.]

WPI 351.04

IMPROPER MEANS—DEFINITION

The phrase "improper means" includes theft, bribery, misrepresentation, breach or inducement of a breach of a duty to maintain secrecy, or espionage through electronic or other means.

[On the other hand, the phrase "improper means" does not include acquiring information through independent development or invention, research of public or industry resources, or reverse engineering.]

NOTE ON USE

Use this instruction, as appropriate, with WPI 351.03 (Misappropriation—Definition). Use bracketed material as applicable. If there is a claim that information was obtained through "reverse engineering," also use WPI 351.07 (Reverse Engineering—Definition).

COMMENT

The first paragraph of this instruction is taken from RCW 19.108.010(1). The bracketed second paragraph is derived from the American Bar Association's model instruction on "improper means." Nelson & Fisher, Am. Bar Ass'n Section of Litigation, Model Jury Instructions: Business Torts Litigation § 8.4.1 (4th ed.).

"Theft" includes acting "[b]y color or aid of deception to obtain control." See RCW 9A.56.020(1)(b) (definition of criminal theft); RCW 9A.56.010(6) (including unauthorized use or copying of trade secrets within criminal theft).

For a discussion of "proper means"-including discovery by independent invention, by reverse engineering, under license from owner of trade secret, by observation of the item in public use, etc., see Unif. Trade Secrets Act with 1985 Amendments § 1 Comment, 14 U.L.A. (2005).

[Current as of September 2018.]

WPI 351.05

INDEPENDENT ECONOMIC VALUE—DEFINITION

Information has "independent economic value" if it gives the owner of the information a competitive advantage over others who do not know the information.

In determining whether information derives "independent economic value" from not being generally known or readily ascertainable, you may consider, among other factors, the following:

(1) The value of the information to the plaintiff and to the plaintiff's competitors;

(2) The amount of effort or money that the plaintiff expended in developing the information;

(3) The extent of measures that the plaintiff took to guard the secrecy of the information;

(4) The ease or difficulty of acquiring or duplicating the information by proper means;

(5) The degree to which third parties have placed the information in the public domain or rendered the information readily ascertainable.

NOTE ON USE

This instruction should be used with WPI 351.02 (Trade Secret—Definition). Not all of the factors in the second paragraph might apply to a particular case, and other factors—or no specific factors at all—might be appropriate to assure that the instruction does not constitute a comment on the evidence by emphasizing some factors disproportionately.

COMMENT

In order for information to qualify as a trade secret, the information must derive "independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable by

proper means by, other persons who can obtain economic value from its disclosure or use." RCW 19.108.010(4)(a). In determining whether information has "independent economic value" under the Uniform Trade Secrets Act, most courts look to whether the information confers a "competitive advantage" upon the plaintiff. Nelson & Fisher, Am. Bar Ass'n Section of Litigation, Model Jury Instructions: Business Torts Litigation § 8.3.3 (4th ed.), and cases cited therein. See also cases collected in Unif. Trade Secrets Act with 1985 Amendments § 1, Notes of Decisions n.46, 14 U.L.A. (2005).

This is consistent with the common law rule that only those secrets affording a competitive advantage may properly be considered trade secrets. See Restatement (Third) of Unfair Competition § 39 (1995) ("A trade secret is any information that can be used in the operation of a business or other enterprise and that is sufficiently valuable and secret to afford an actual or potential economic advantage over others.").

In related contexts, courts interpreting RCW 19.108.010(4) (definition of trade secret) have also emphasized the importance of the competitive advantage that arises from knowledge of a trade secret. For example, in Buffets, Inc. v. Klinke, 73 F.3d 965, 968–69 (9th Cir. 1996), the plaintiff was held not to have established "independent economic value" simply by showing competitors' lack of success, when there was "no demonstrated relationship" between their lack of success and the unavailability of the alleged trade secret.

In Ed Nowogroski Ins., Inc. v. Rucker, 137 Wn.2d 427, 437, 971 P.2d 936 (1999), the court noted that "[w]here [a] former employee seeks to use the trade secrets of the former employer in order to obtain a competitive advantage, then competitive activity can be enjoined or result in an award of damages." See also Boeing Co. v. Sierracin Corp., 108 Wn.2d 38, 52, 738 P.2d 665 (1987) (holding that confidential information did not lose its trade secret status upon submission to the FAA, as the information submitted was exempt from public disclosure "because it could substantially harm the competitive position of the entity . . . required to submit [it]").

"In determining whether information has 'independent economic value' under the Uniform Trade Secrets Act, one of the key factors used by the courts is the effort and expense that was expended on developing the information." Ed Nowogroski Ins., Inc. v. Rucker, 137 Wn.2d at 438; see Pacific Aerospace & Elecs., Inc. v. Taylor, 295 F.Supp.2d 1205, 1214–15 (E.D. Wash. 2003) (defendant attributed economic value to the information and did not compile it from allegedly available public sources).

Other courts have identified the following factors that a court may examine to determine whether information derives independent economic value from not being generally known or readily ascertainable:

(1) the value of the information to the plaintiff and to the plaintiff's competitors; (2) the amount of effort or money that the plaintiff expended in developing the information; (3) the extent of measures that the plaintiff took to guard the secrecy of the information; (4) the ease or difficulty with which others could properly acquire or duplicate the information; and (5) the degree to which third parties have placed the information in the public domain or rendered the information readily ascertainable. See Spottiswoode v. Levine, 730 A.2d 166, 174 n.6 (Me. 1999), and cases cited therein.

For another phrasing of factors to consider, see Nelson & Fisher, Am. Bar Ass'n Section of Litigation, Model Jury Instructions: Business Torts Litigation § 8.3.3 (4th ed. 2005).

> While a defendant does not need to go so far as to establish that the information is known to or readily ascertainable to the general public to defeat a trade secret claim, a plaintiff cannot establish that a trade secret exists if the information is generally known to or readily ascertainable by other persons who can obtain economic value from its disclosure or use.

Precision Moulding & Frame, Inc. v. Simpson Door Co., 77 Wn.App. 20, 26, 888 P.2d 1239 (1995). That is, the "existence of a trade secret [is] measured by the accessibility of the information within a given industry." Precision Moulding & Frame, Inc. v. Simpson Door Co., 77 Wn.App. at 26–27.

[Current as of September 2018.]

WPI 351.06

READILY ASCERTAINABLE—DEFINITION

(The WPI Committee recommends that no instruction be given on this subject.)

[Current as of September 2018.]

WPI 351.07

REVERSE ENGINEERING—DEFINITION

Reverse engineering is the process of recreating trade secret information by analyzing a product that was properly acquired.

NOTE ON USE

Use this instruction with WPI 351.04 (Improper Means—Definition) when there is an issue as to whether the defendant obtained, or easily and inexpensively could have obtained, the information through reverse engineering.

COMMENT

This instruction is designed to explain to the jury what is meant by "reverse engineering." In the American Bar Association's proposed instruction on "improper means," reverse engineering is described as the "purchase of a product that contains trade secrets and then disassembling it to analyze those secrets." Nelson & Fisher, Am. Bar Ass'n Section of Litigation, Model Jury Instructions: Business Torts Litigation § 8.4.1 (4th ed. 2005). In the ABA's proposed instruction on "competitive advantage," reverse engineering is described as "taking apart and analyzing a product properly acquired to learn its secrets." Am. Bar Ass'n Section of Litigation, Model Jury Instructions: Business Torts Litigation at § 8.3.3.

As a general rule, reverse engineering is a proper means of acquiring trade secret information. See Boeing Co. v. Sierracin Corp., 108 Wn.2d 38, 53–54, 738 P.2d 665 (1987); Restatement (First) of Torts § 757, cmt. a, (1939); Am. Bar Ass'n Section of Litigation, Model Jury Instructions: Business Torts Litigation at § 8.4.1.

The jury may also consider evidence of whether the plaintiff's claimed trade secret could be reverse engineered for purposes of determining whether the plaintiff's information met the standards of secrecy required of a trade secret. See the Comment to WPI 351.04 (Improper Means—Definition). See also Nelson & Fisher, Am. Bar Ass'n Section of Litigation, Model Jury Instructions: Business Torts Litigation § 8.3.3, p. 405 (4th ed.).

[Current as of September 2018.]

WPI 351.08

REASONABLE EFFORTS TO MAINTAIN SECRECY—DEFINITION

In determining whether information is "the subject of efforts that are reasonable under the circumstances to maintain its secrecy," you may consider, among other factors, the following:

(1) The extent to which the information is known outside the plaintiff's business;

(2) The extent to which employees and others in the plaintiff's business know the information;

(3) The nature and extent of the measures the plaintiff took to guard the secrecy of the information;

(4) The existence or absence of an express agreement restricting disclosure; and

(5) The extent to which the circumstances under which the information was disclosed to others indicate that further disclosure without the plaintiff's consent was prohibited.

NOTE ON USE

This instruction should be used with WPI 351.02 (Trade Secret—Definition) in those instances when the reasonableness of the plaintiff's efforts to maintain the secrecy of the alleged trade secret is at issue.

In particular cases, the word "business" will need to be modified to a more appropriate term, such as "occupation" or "field."

COMMENT

For information to qualify as a trade secret, the information must be "the subject of efforts that are reasonable under the circumstances to maintain its secrecy." See RCW 19.108.010(4)(b); Robbins, Geller, Rudman & Dowd, LLP v. State, 179 Wn.App. 711, 328 P.3d 905 (2014).

In determining whether information is the subject of reasonable efforts to maintain its secrecy, other courts have identified the following factors that a court may examine:

> (1) the extent to which the information is known outside the plaintiff's business; (2) the extent to which employees and others involved in the plaintiff's business know the information; (3) the nature and extent of measures the plaintiff took to guard the secrecy of the information; (4) the existence or absence of an express agreement restricting disclosure; and (5) the circumstances under which the information was disclosed . . ., to the extent that the circumstances give rise to a reasonable inference that further disclosure without the plaintiff's consent is prohibited.

Spottiswoode v. Levine, 730 A.2d 166, 175 n.7 (Me. 1999).

For another phrasing of factors to consider, see Nelson & Fisher, Am. Bar Ass'n Section of Litigation, Model Jury Instructions: Business Torts Litigation § 8.3.2, p. 401 (4th ed.).

[Current as of September 2018.]

CHAPTER 352

TORTIOUS INTERFERENCE WITH ECONOMIC RELATIONS

WPI 352.01	Tortious Interference With Contract—Burden of Proof on the Issues—No Affirmative Defense
WPI 352.01.01	Tortious Interference With Contract—Burden of Proof on the Issues—With Affirmative Defenses
WPI 352.02	Tortious Interference With Business Expectancy—Burden of Proof on the Issues—No Affirmative Defense
WPI 352.02.01	Tortious Interference With Business Expectancy—Burden of Proof on the Issues—With Affirmative Defenses
WPI 352.03	Tortious Interference—Improper Purpose—Improper Means—Definitions
WPI 352.04	Tortious Interference With Contract—Affirmative Defense—Legally Protected Interest
WPI 352.05	Tortious Interference With Business Expectancy—Affirmative Defense—Competition
WPI 352.06	Tortious Interference With Business Expectancy—Affirmative Defense—Financial Interest

WPI 352.01

TORTIOUS INTERFERENCE WITH CONTRACT—BURDEN OF PROOF ON THE ISSUES—NO AFFIRMATIVE DEFENSE

To recover on a claim of tortious interference with contract, (name of plaintiff) **has the burden of proving each of the following propositions:**

(1) That at the time of the conduct at issue, (name of plaintiff) **was a party to a valid contract with** (name of breaching party) **[to** (state purpose of contract)**];**

(2) That (name of defendant) **knew of the existence of that contract;**

(3) That (name of defendant) **intentionally induced or caused** (name of breaching party) **to breach the contract with** (name of plaintiff)**;**

(4) That (name of defendant)**'s interference was for an improper purpose or by improper means, as defined later in these instructions; and**

(5) That the conduct of (name of defendant) **was a proximate cause of damages to** (name of plaintiff)**.**

If you find from your consideration of all the evidence that each of these propositions has been proved, then your verdict should be for (name of plaintiff) **[on this claim]. On the other hand, if you find that any of these propositions has not been proved, your verdict should be for** (name of defendant) **[on this claim].**

NOTE ON USE

This instruction is designed for use in a tortious interference with contract case, without an affirmative defense. For a tortious interference with contract case with one or more affirmative defenses, use WPI 352.01.01 (Tortious Interference with Contract—Burden of Proof on the Issues—With Affirmative Defenses).

For a case based on tortious interference with a business relationship or expectancy that has not ripened into a contract, use WPI 352.02 (Tortious Interference with Business Expectancy—Burden of Proof on the Issues—No Affirmative Defense) instead of this instruction.

Use this instruction with WPI 21.01 (Meaning of Burden of Proof) and with an instruction defining proximate cause—WPI 15.01 (the traditional instruction) or WPI 15.01.01 (the alternative instruction). Use this instruction with WPI 352.03 (Tortious Interference—Improper Purpose—Improper Means—Definitions) when appropriate to the case.

If the alleged interference is with a contract that is terminable at will, use WPI 352.02 (Tortious Interference with Business Expectancy—Burden of Proof on the Issues—No Affirmative Defense) instead of this instruction. See the Comment to WPI 352.02 (Tortious Interference with Business Expectancy—Burden of Proof on the Issues—No Affirmative Defense).

COMMENT

This instruction is based upon the court's formulation in Pacific

Northwest Shooting Park Ass'n v. City of Sequim, 158 Wn.2d 342, 351, 144 P.3d 276 (2006):

> A party claiming tortious interference with a contractual relationship or business expectancy must prove five elements:
>
> (1) the existence of a valid contractual relationship or business expectancy; (2) that defendants had knowledge of that relationship; (3) an intentional interference inducing or causing a breach or termination of the relationship or expectancy; (4) that defendants interfered for an improper purpose or used improper means; and (5) resultant damage.

See also Leingang v. Pierce County Med. Bureau, 131 Wn.2d 133, 157, 930 P.2d 288 (1997); Commodore v. Univ. Mech. Contractors, Inc., 120 Wn.2d 120, 137, 839 P.2d 314 (1992); Moore v. Commercial Aircraft Interiors, LLC, 168 Wn.App. 502, 508–09, 278 P.3d 197 (2012).

Valid contract. A contract may be valid, and therefore provide the basis for a tortious interference with contract claim, even though it is voidable. See Restatement (Second) of Torts § 766, comment f (1979). Similarly, there may be a cause of action for interference with contract, even though the contract is terminable at will. Restatement (Second) of Torts § 766, comment g (1979); cf. Calbom v. Knudtzon, 65 Wn.2d 157, 396 P.2d 148 (1964) (discussing termination of contract that is terminable at will as interference with business expectancy); but see Woody v. Stapp, 146 Wn.App. 16, 24, 189 P.3d 807 (2008) ("Generally, at-will employees do not have a business expectancy in continued employment").

A plaintiff must show that the interferer was an intermeddling third party; a party to the relationship cannot be held liable for tortious interference. Houser v. City of Redmond, 91 Wn.2d 36, 39, 586 P.2d 482 (1978); Vasquez v. State, 94 Wn.App. 976, 989, 974 P.2d 348 (1999).

If there is no valid contract between the plaintiff and a third party, the plaintiff may still have a valid cause of action for intentional interference with business expectancy. Scymanski v. Dufault, 80 Wn.2d 77, 491 P.2d 1050 (1971).

If the agreement is invalid or void because it is illegal or contrary to public policy, a defendant will not be liable for preventing its performance. Restatement (Second) of Torts § 774 (1979); see also Davidson v. Hensen, 135 Wn.2d 112, 128–29 n.7, 954 P.2d 1327 (1998) (distinguishing statutory violations that void an agreement from those that merely render an agreement unenforceable).

Knowledge. Although knowledge of the existence of a contract, or business relationship, is an essential element of tortious interference,

"it is sufficient if the evidence reveals that the alleged interferer had knowledge of facts giving rise to the existence of the relationship. It is not necessary that the interferer understood the legal significance of such facts." Calbom v. Knudtzon, 65 Wn.2d 157, 165, 396 P.2d 148 (1964). The alleged interferer must have had such knowledge at the time of the interfering conduct. Fisher v. Parkview Props, Inc., 71 Wn.App. 468, 479, 859 P.2d 77 (1993); see also Roger Crane & Assocs. v. Felice, 74 Wn.App. 769, 778, 875 P.2d 705 (1994).

Intentional interference. The plaintiff must show that the interference was intentional. White River Estates v. Hiltbruner, 134 Wn.2d 761, 768, 953 P.2d 796 (1998); Woody v. Stapp, 146 Wn.App. 16, 23, 189 P.3d 807 (2008). The rule may apply not only to situations in which the interference is a primary purpose of the interferer, but also to situations "in which the actor does not act for the purpose of interfering with the contract or desire it but knows that the interference is certain or substantially certain to occur as a result of his action." Restatement (Second) of Torts § 766 cmt. j (1979). The incidental nature of the interference may, however, be taken into account in determining whether the conduct was improper.

Improper purpose or improper means. The plaintiff has the burden of proving improper purpose or improper means as part of the plaintiff's burden since Pleas v. City of Seattle, 112 Wn.2d 794, 774 P.2d 1158 (1989). See also Moore v. Commercial Aircraft Interiors, LLC, 168 Wn.App. 502, 509, 278 P.3d 197 ("[O]ur Supreme Court definitely added the element of improper purpose or means to the plaintiff's prima facie burden . . ."); Koch v. Mut. of Enumclaw Ins. Co., 108 Wn.App. 500, 506–07, 31 P.3d 698 (2001) (placing burden on plaintiff to show that doctor's advice was dishonest or offered in bad faith); WPI 352.03 (Tortious Interference—Improper Purpose—Improper Means—Definitions) and its Comment.

Affirmative defense issues in this context have not been addressed in Washington. The Restatement (First) of Torts treated a number of circumstances or categories of conduct on the part of defendants as matters of privilege or justification. See Restatement (First) of Torts §§ 768 to 773 (1939); see also the examples cited in the Comment to WPI 352.03 (Tortious Interference—Improper Purpose—Improper Means—Definitions). The Restatement (Second) of Torts, however, analyzes most of the same situations and categories of conduct as matters of proper or improper conduct. Restatement (Second) of Torts §§ 768 to 773 (1979).

In *Pleas*, the court made proof of improper interference part of the plaintiff's case, but also held that "matters of privilege and justification continue to be affirmative defenses to be raised by the defendant." Pleas v. City of Seattle, 112 Wn.2d 794, 804, 774 P.2d 1158. The WPI Com-

mittee has therefore included proof of improper purpose or improper means in this instruction, while setting forth such matters as legally protected interest, financial interest, or competition as defenses in WPI 352.04 through 352.06.

Damages. Damages based on a claim of tortious interference may include not only economic loss but also damages for mental anguish, and for discomfort and inconvenience. Cherberg v. Peoples Nat'l Bank, 88 Wn.2d 595, 602, 564 P.2d 1137 (1977). The plaintiff must "tie . . . losses to *specific relationships*" between the plaintiff and "identifiable third parties." Pacific Northwest Shooting Park Ass'n v. City of Sequim, 158 Wn.2d 342, 352–53, 144 P.3d 276 (2006) (emphasis in original).

Such damages must be actually caused by the interference. Sea-Pac Co. v. United Food & Commercial Workers, 103 Wn.2d 800, 805, 699 P.2d 217 (1985).

In a case involving termination of plaintiff's contract for professional services, the proper measure of damages was the value of the business expectancy interfered with, and the defendant had the burden of offering evidence bearing on any claimed off-set for costs involved in performance. Calbom v. Knudtzon, 65 Wn.2d 157, 166–67, 396 P.2d 148 (1964).

Cross-reference. An extended discussion of tortious interference can be found in DeWolf & Allen, 16A Washington Practice, Tort Law and Practice §§ 23:2–23:6 (4th ed.).

[Current as of September 2018.]

WPI 352.01.01

TORTIOUS INTERFERENCE WITH CONTRACT—BURDEN OF PROOF ON THE ISSUES—WITH AFFIRMATIVE DEFENSES

To recover on a claim of tortious interference with contract, (name of plaintiff) **has the burden of proving each of the following propositions:**

(1) That at the time of the conduct at issue, (name of plaintiff) **was a party to a valid contract with** (name of breaching party) **[to** (state purpose of contract)**];**

(2) That (name of defendant) **knew of the existence of that contract;**

(3) That (name of defendant) **intentionally induced or caused** (name of breaching party) **to breach the contract with** (name of plaintiff)**;**

(4) That (name of defendant)**'s interference was for an improper purpose or by improper means, as defined later in these instructions; and**

(5) That the conduct of (name of defendant) **was a proximate cause of damages to** (name of plaintiff)**.**

To establish a defense of (identify affirmative defense), (name of defendant) **has the burden of proving the following proposition(s):**

(Here set forth the necessary elements of any affirmative defenses at issue.)

If you find from your consideration of all the evidence that (name of plaintiff) **has established each of the elements of the tortious interference claim, and** (name of defendant) **has not established the elements of** (identify affirmative defense)**, then your verdict should be for** (name of plaintiff)**. On the other hand, if**

one or more of the elements of tortious interference claim has not been proved, or if (name of defendant) **has established the elements of** (identify affirmative defense), **then your verdict should be for** (name of defendant).

NOTE ON USE

This instruction is designed for use in a tortious interference with contract case with affirmative defenses. For a tortious interference with contract case without an affirmative defense use WPI 352.01 (Tortious Interference with Contract—Burden of Proof on the Issues—No Affirmative Defense) instead of this instruction. See the Note on Use to WPI 352.02 (Tortious Interference with Business Expectancy—Burden of Proof on the Issues—No Affirmative Defense) for discussion of instructions for a case based on tortious interference with a business relationship or expectancy that has not ripened into a contract.

Use this instruction with WPI 21.01 (Meaning of Burden of Proof) and with an instruction defining proximate cause—WPI 15.01 (the traditional instruction) or WPI 15.01.01 (the alternative instruction).

Use this instruction with WPI 352.03 (Tortious Interference—Improper Purpose—Improper Means—Definitions) and WPI 352.04 (Tortious Interference with Contract—Affirmative Defense—Legally Protected Interest), when appropriate to the case.

Do not use this instruction with WPI 352.05 (Tortious Interference with Business Expectancy—Affirmative Defense—Competition) or WPI 352.06 (Tortious Interference with Business Expectancy—Affirmative Defense—Financial Interest).

If the alleged interference is with a contract that is terminable at will, use WPI 352.02 (Tortious Interference with Business Expectancy—Burden of Proof on the Issues—No Affirmative Defense), or WPI 352.02.01 (Tortious Interference with Business Expectancy—Burden of Proof on the Issues—With Affirmative Defenses), instead of this instruction. See the Comment to WPI 352.02 (Tortious Interference with Business Expectancy—Burden of Proof on the Issues—No Affirmative Defense).

COMMENT

See the Comment to WPI 352.01 (Tortious Interference with Contract—Burden of Proof on the Issues—No Affirmative Defense) regarding the plaintiff's burden.

The Washington Supreme Court in Pleas v. City of Seattle, 112 Wn.2d 794, 804, 774 P.2d 1158 (1989), held that "matters of privilege and justification continue to be affirmative defenses to be raised by the

defendant." See also Moore v. Commercial Aircraft Interiors, LLC, 168 Wn. App, 502, 509, 278 P.3d 197 (2012) ("Only after the plaintiff establishes the five elements of the tort does the burden shift to the defendant to show, as an affirmative defense, that its interference was either privileged or justified.").

With regard to the defendant's burden, and whether matters should be treated as affirmative defenses or an aspect of improper interference, see the Comments to WPI 352.03 (Tortious Interference—Improper Purpose—Improper Means—Definitions) and WPI 352.04 (Tortious Interference with Contract—Affirmative Defense—Legally Protected Interest).

An extended discussion of tortious interference can be found in DeWolf & Allen, 16A Washington Practice, Tort Law and Practice §§ 23:2–23:6 (4th ed.).

[Current as of September 2018.]

WPI 352.02

TORTIOUS INTERFERENCE WITH BUSINESS EXPECTANCY—BURDEN OF PROOF ON THE ISSUES—NO AFFIRMATIVE DEFENSE

To recover on a claim of tortious interference with business [relationship] [or] [expectancy], (name of plaintiff) has the burden of proving each of the following propositions:

(1) That at the time of the conduct at issue, (name of plaintiff) had a business [relationship] [or] [expectancy] with a probability of future economic benefit for (name of plaintiff);

(2) That (name of defendant) knew of the existence of that business [relationship] [or] [expectancy];

(3) That (name of defendant) intentionally induced or caused the termination of the business [relationship] [or] [expectancy];

(4) That (name of defendant)'s interference was for an improper purpose or by improper means, as defined later in these instructions; and

(5) That the conduct of (name of defendant) was a proximate cause of damages to (name of plaintiff).

If you find from your consideration of all the evidence that each of these propositions has been proved, then your verdict should be for (name of plaintiff) [on this claim]. On the other hand, if you find that any of these propositions has not been proved, your verdict should be for (name of defendant) [on this claim].

NOTE ON USE

In a tortious interference case that does not involve inducing or causing breach of a valid contract, use this instruction, rather than WPI 352.01 (Tortious Interference with Contract—Burden of Proof on the Is-

sues—No Affirmative Defense). If there are affirmative defenses, use WPI 352.02.01 (Tortious Interference with Business Expectancy—Burden of Proof on the Issues—With Affirmative Defenses), instead of this instruction.

Use the applicable bracketed phrase or phrases. If a contract terminable at will is involved, use "relationship" rather than "expectancy."

Use this instruction with WPI 21.01 (Meaning of Burden of Proof), and with an instruction defining proximate cause—WPI 15.01 (the traditional instruction) or WPI 15.01.01 (the alternative instruction).

When appropriate to the facts of the case, this instruction may be used with WPI 352.03 (Tortious Interference—Improper Purpose—Improper Means—Definitions).

COMMENT

If defendant has interfered in a business relationship between plaintiff and a third party that does not involve a valid contract, the plaintiff may still have a valid cause of action for intentional interference with business expectancy. Scymanski v. Dufault, 80 Wn.2d 77, 84–85, 491 P.2d 1050 (1971).

Prospective contractual relationships, other than contracts to marry, are protected against intentional interference when the potential contract would be of pecuniary advantage to the plaintiff. For example, interference with the prospect of obtaining employment or an employee, or the opportunity to sell or buy land, services, or chattel, may be actionable. Scymanski v. Dufault, 80 Wn.2d 77, 83–84, 491 P.2d 1050 (1971) (citing Restatement (First) of Torts § 766A (1939)). "All that is needed is a relationship between parties contemplating a contract, with at least a reasonable expectation of fruition." Scymanski v. Dufault, 80 Wn.2d at 84–85.

The plaintiff "must show that the future opportunities and profits are a reasonable expectation and not based on merely wishful thinking." Sea-Pac Co. v. United Food & Commercial Workers Local Union 44, 103 Wn.2d 800, 805, 699 P.2d 217 (1985).

The business expectancy must be valid, or legitimate. Thus, in a situation in which a contract is void for violation of public policy, an action based on business expectancy will be defeated. Davidson v. Hensen, 135 Wn.2d 112, 128–29 n.7, 954 P.2d 1327 (1998) (distinguishing statutory violations that void an agreement from those that merely render an agreement unenforceable). See Murray Publ'g Co. v. Malmquist, 66 Wn.App. 318, 832 P.2d 493 (1992) (burden on defendant to show business expectancy would constitute unlawful restraint of trade). Cf. Re-

statement (Second) of Torts § 774 (1979); Restatement (First) of Torts § 774 (1939).

The plaintiff must "tie . . . losses to *specific relationships*" between the plaintiff and "identifiable third parties." Pac. Nw. Shooting Park Ass'n v. City of Sequim, 158 Wn.2d 342, 352–53, 144 P.3d 276 (2006) (emphasis in original); see also Hudson v. City of Wenatchee, 94 Wn.App. 990, 998, 974 P.2d 342 (1999). A pleading alleging a relationship to an amorphous group is insufficient. Pac. Nw. Shooting Park Ass'n v. City of Sequim, 158 Wn.2d at 352–53, n.2.

With the exception of the analysis of what constitutes proper or improper interference, or the related applicability of defenses such as competition or financial interest, recent Washington cases usually do not distinguish between tortious interference with contract and tortious interference with business expectancy or relationships in their analysis of the remaining elements. See the Comment to WPI 352.01 (Tortious Interference with Contract—Burden of Proof on the Issues—No Affirmative Defense) for comments on elements (2) through (5), and the question of whether matters are properly analyzed as issues of proper or improper conduct, or affirmative defenses.

Cross-reference. An extended discussion of tortious interference can be found in DeWolf & Allen, 16A Washington Practice, Tort Law and Practice §§ 23:2–23:6 (4th ed.).

[Current as of September 2018.]

WPI 352.02.01

TORTIOUS INTERFERENCE WITH BUSINESS EXPECTANCY—BURDEN OF PROOF ON THE ISSUES—WITH AFFIRMATIVE DEFENSES

To recover on a claim of tortious interference with business [relationship] [or] [expectancy], (name of plaintiff) **has the burden of proving each of the following propositions:**

(1) That at the time of the conduct at issue, (name of plaintiff) **had a business relationship or expectancy with a probability of future economic benefit for** (name of plaintiff)**;**

(2) That (name of defendant) **knew of the existence of that business [relationship] [or] [expectancy];**

(3) That (name of defendant) **intentionally induced or caused the termination of the business [relationship] [or] [expectancy];**

(4) That (name of defendant's) **interference was for an improper purpose or by improper means, as defined later in these instructions;**

(5) That the conduct of (name of defendant) **was a proximate cause of damages to** (name of plaintiff).

To establish a defense of (identify affirmative defense), (name of defendant) **has the burden of proving the following propositions:**

(Here set forth the necessary elements of any affirmative defenses at issue.)

If you find from your consideration of all the evidence that (name of plaintiff) **has established each of the elements of the tortious interference claim, and** (name of defendant) **has not established the elements of** (identify affirmative defense)**, then your**

verdict should be for (name of plaintiff)**. On the other hand, if one or more of the elements of tortious interference claim has not been proved, or if** (name of defendant) **has established the elements of** (identify affirmative defense)**, then your verdict should be for** (name of defendant)**.**

NOTE ON USE

In a tortious interference case that does not involve inducing or causing breach of a valid contract, use this instruction, rather than WPI 352.01 (Tortious Interference with Contract—Burden of Proof on the Issues—No Affirmative Defense). If there are no affirmative defenses, use WPI 352.02 (Tortious Interference with Business Expectancy—Burden of Proof on the Issues—No Affirmative Defense), instead of this instruction.

Use this instruction with WPI 21.01 (Meaning of Burden of Proof), and with an instruction defining proximate cause—WPI 15.01 (the traditional instruction) or WPI 15.01.01 (the alternative instruction).

When appropriate to the facts of the case, this instruction may be used with WPI 352.03 (Tortious Interference—Improper Purpose—Improper Means—Definitions), WPI 352.05 (Tortious Interference with Business Expectancy—Affirmative Defense—Competition), or WPI 352.06 (Tortious Interference with Business Expectancy—Affirmative Defense—Financial Interest).

COMMENT

See the Comment to WPI 352.02 (Tortious Interference with Business Expectancy—Burden of Proof on the Issues—No Affirmative Defense), regarding the plaintiff's burden.

The Washington Supreme Court held in Pleas v. City of Seattle, 112 Wn.2d 794, 804, 774 P.2d 1158 (1989), that "matters of privilege and justification continue to be affirmative defenses to be raised by the defendant." With regard to the defendant's burden, and whether matters should be treated as affirmative defenses or an aspect of improper interference, see the Comments to WPI 352.03 (Tortious Interference—Improper Purpose—Improper Means—Definitions), WPI 352.05 (Tortious Interference with Business Expectancy—Affirmative Defense—Competition), and WPI 352.06 (Tortious Interference with Business Expectancy—Affirmative Defense—Financial Interest).

An extended discussion of tortious interference can be found in another volume of Washington Practice. See DeWolf & Allen, 16A Washington Practice, Tort Law and Practice §§ 23:2–23:6 (4th ed.).

[Current as of September 2018.]

WPI 352.03

TORTIOUS INTERFERENCE—IMPROPER PURPOSE—IMPROPER MEANS—DEFINITIONS

["Interference for improper purpose" is interference with an intent to harm (name of plaintiff)**.]**

["Interference by improper means" is interference that violates a statute, a regulation, a recognized rule of common law, or an established standard of the trade or profession.]

NOTE ON USE

Use the bracketed paragraph(s) applicable to the facts of a particular case.

This instruction will frequently be expanded, based on case law or relevant provisions of the Restatement (Second) of Torts § 767 (1979), as appropriate to the facts of a given case. See the Comment below.

In a tortious interference with contract case, this instruction may be combined with WPI 352.04 (Tortious Interference with Contract—Affirmative Defense—Legally Protected Interest). In a tortious interference with business expectancy case, this instruction may also be combined with WPI 352.05 (Tortious Interference with Business Expectancy—Affirmative Defense—Competition) or WPI 352.06 (Tortious Interference with Business Expectancy—Affirmative Defense—Financial Interest).

When the second paragraph is used, an additional instruction should be drafted to set forth the appropriate statute, regulation, common law rule, or established standard of the trade or profession.

COMMENT

In Pleas v. City of Seattle, 112 Wn.2d 794, 804, 774 P.2d 1158 (1989), the court held that "plaintiff must show not only that the defendant intentionally interfered with his business relationship, but also that the defendant had a 'duty of non-interference'; i.e., that he interfered for an improper purpose . . . or . . . used improper means . . . ." See also Moore v. Commercial Aircraft Interiors, LLC, 168 Wn.App. 502, 510, 278 P.3d 197 (2012); Eugster v. City of Spokane, 121 Wn.App. 799, 811, 91 P.3d 117 (2004).

Interference alone is not enough. Moore v. Commercial Aircraft

Interiors, LLC, 168 Wn. App. 502, 509, 278 P.3d 197 (2012). To be improper, interference must be wrongful by some measure beyond the fact of the interference itself, such as a statute, regulation, recognized rule of common law, or an established standard of trade or profession. Moore v. Commercial Aircraft Interiors, LLC, 168 Wn.App. at 510.

An instruction incorporating the first paragraph was cited with approval in Westmark Dev. Corp. v. City of Burien, 140 Wn.App. 540, 558, 166 P.3d 813 (2007) (trial court properly entered judgment on jury verdict finding tortious interference).

According to the Restatement (Second) of Torts § 767 (1979), in "determining whether an actor's conduct in intentionally interfering with a contract or a prospective contractual relation of another is improper or not, consideration is given" to the following factors:

(a) the nature of the actor's conduct;

(b) the actor's motive;

(c) the interests of the other with which the actor's conduct interferes;

(d) the interests sought to be advanced by the actor;

(e) the societal interests in protecting the freedom of action of the actor and the contractual interests of the other;

(f) the proximity or remoteness of the actor's conduct to the interference; and

(g) the relations between the parties.

In 2005, the ABA proposed a general instruction setting forth the factors above for the jury's consideration. Nelson & Fisher, Am. Bar Ass'n Section of Litigation, Model Jury Instructions: Business Torts Litigation § 2.7 (4th ed.) (2005). However, the WPI Committee is of the view that such an instruction is too vague to provide helpful guidance, and suggests instead an instruction tailored to the claims of the case.

With regard to improper purpose, in *Pleas* the court used the formulation of "an improper objective of harming the plaintiff." Pleas v. City of Seattle, 112 Wn.2d 794, 803–04, 774 P.2d 1158 (1989) (citing Top Serv. Body Shop, Inc. v. Allstate Ins. Co., 283 Or. 201, 582 P.2d 1365 (1978)). See also Westmark Dev. Corp. v. City of Burien, 140 Wn. App. 540, 558, 166 P.3d 813 (2007). To the extent that such a purpose may be justified or privileged, the defendant may have an affirmative defense, such as those set forth in WPI 352.04 (Tortious Interference with Contract—Affirmative Defense—Legally Protected Interest), WPI

352.05 (Tortious Interference with Business Expectancy—Affirmative Defense—Competition), or WPI 352.06 (Tortious Interference with Business Expectancy—Affirmative Defense—Financial Interest).

Improper purpose or motive was also examined in Cherberg v. Peoples Nat'l Bank, 88 Wn.2d 595, 605, 564 P.2d 1137 (1977), in which the court held that the defendant-lessor could be sued by the plaintiff-lessee for tortious interference with business expectancy, even though the lessor's conduct also constituted a breach of the lease agreement. The court stated:

> Tort liability . . . can properly be imposed, as it is here, when the evidence adequately establishes the underlying motive for the intentional breach by the lessor was not the economic viability of the lessor's investment, in its present state, but rather was economic considerations outside the scope of the parties' obligations under their existing agreement.
>
> A party to a lease or contract should not be held liable in tort for a willful breach of an agreement which it is no longer economically feasible for the parties to respect . . . [But here there is] evidence in the record from which the jury could have inferred the lessor used the [unrepaired] condition of the wall as a means to oust the petitioners and gain possession of the leased premises in order that the lessor might put those premises to a different and perhaps considerably more profitable use. Proof of a breach based upon such a motive demonstrates a failure to make a good faith effort to meet obligations under the lease and may give rise to liability in tort.

Cherberg v. Peoples Nat'l Bank, 88 Wn.2d at 605. See also Schmerer v. Darcy, 80 Wn.App. 499, 910 P.2d 498 (1996) (trial court properly dismissed claim for tortious interference when lienholder was seeking to protect legitimate interest).

The definition of "improper means" in the instruction is based upon the statement in Pleas v. City of Seattle, 112 Wn.2d 794, 804, 774 P.2d 1158 (1989): "Interference can be 'wrongful' by reason of a statute or other regulation, or a recognized rule of common law, or an established standard of trade or profession." Whether the conduct is lawful is a question for the court. Thereafter, the question of whether surrounding circumstances justify the conduct, and the existence of such circumstances, are questions of fact for the jury. Restatement (Second) of Torts § 767, cmt. l (1979).

Improper means also have been described as including physical violence, fraudulent misrepresentation, or threats of illegal conduct. Restatement (Second) of Torts § 767, cmt. c (1979). Improper means also include a city's enforcement of an ordinance that had been invalidated by a court order. Sintra, Inc. v. City of Seattle, 119 Wn.2d 1, 829 P.2d 765 (1992).

Threatening to file a lawsuit may constitute an interference by improper means when the interferor "has no belief in the merit of the litigation" or threatens litigation "only to harass the third parties and not to bring his claim to definitive adjudication." Moore v. Commercial Aircraft Interiors, LLC, 168 Wn.App. 502, 509, 278 P.3d 197 (2012) (quoting Restatement (Second) of Torts § 767 cmt. c (1979)). For example, threatening to file a lawsuit may constitute an interference for an improper purpose if, the interferor is acting out of ill will, greed, retaliation, or hostility or is motivated by an intent to harm the plaintiff. Moore v. Commercial Aircraft Interiors, LLC, 168 Wn.App. 502, 509, 278 P.3d 197 (2012) (citing Restatement (Second) of Torts § 767 cmt. d (1979)).

In addition, the Restatement (Second) of Torts contains a number of specific rules defining various actions or motives as "proper" or "improper." See, e.g., Restatement (Second) of Torts §§ 768 to 773 (1979). In the Restatement (First) of Torts (1939), however, the same actions were analyzed as "privileges." See Restatement (First) of Torts §§ 768 to 773 (1939).

According to Pleas v. City of Seattle, 112 Wn.2d 794, 804, 774 P.2d 1158 (1989), even though proof of improper purpose or improper means is now part of the plaintiff's prima facie case, "matters of privilege or justification continue to be affirmative defenses to be raised by the defendant." Pleas v. City of Seattle, 112 Wn.2d at 804. Some of those matters that were formerly considered privileges in the Restatement are therefore presented as defenses, see WPI 352.05 (Tortious Interference with Business Expectancy—Affirmative Defense—Competition) or WPI 352.06 (Tortious Interference with Business Expectancy—Affirmative Defense—Financial Interest).

[Current as of September 2018.]

WPI 352.04

TORTIOUS INTERFERENCE WITH CONTRACT—AFFIRMATIVE DEFENSE—LEGALLY PROTECTED INTEREST

(Name of defendant) **claims that [he] [she] [it] acted to protect a legal right.**

If you find that (name of defendant) **has proved that [he] [she] [it] acted in good faith to protect, by proper means, a legal right of** (name of defendant), **such as** (name of defendant's) **[property] [contractual] [**(describe other)**] interest, then** (name of defendant's) **conduct in inducing the breach of contract between** (name of plaintiff) **and** (name of breaching party) **was proper.**

If you find, however, that (name of defendant) **acted merely in pursuit of a potential future advantage, not yet realized, then the defendant was not protecting a legal right.**

NOTE ON USE

In a tortious interference with contract case, use this instruction with WPI 352.01.01 (Tortious Interference with Contracts—Burden of Proof on the Issues—With Affirmative Defenses) and WPI 352.03 (Tortious Interference—Improper Purpose—Improper Means—Definitions) when warranted by the evidence.

COMMENT

With respect to the interests of the defendant, see Restatement (Second) of Torts § 767, comments d and f (1979), and 44B Am.Jur. 2d Interference § 29 (2017). According to Keeton, Prosser and Keeton on Torts:

> The defendant is . . . permitted to interfere with another's contractual relations to protect his own present existing economic interests, such as the ownership or condition of property, or a prior contract of his own, or a financial interest in the affairs of the person persuaded. He is not free, under this rule, to induce a contract breach merely to obtain customers or other prospective economic advantage; but he may do so to protect what he perceives to be existing interests . . .

Keeton, Prosser and Keeton on Torts § 129, at 986 (5th ed.).

According to the Restatement (Second) of Torts § 773 (1979):

> One who, by asserting in good faith a legally protected interest of his own or threatening in good faith to protect the interest by appropriate means, intentionally causes a third person not to perform an existing contract or enter into a prospective contractual relation with another does not interfere improperly with the other's relation if the actor believes that his interest may otherwise be impaired or destroyed by the performance of the contract or transaction.

Though the wording of the Restatement (Second) suggests that the issue should be treated as a definition of "improper," assertion of a "bona fide claim" was a justification or privilege under the Restatement (First) of Torts § 773 (1939). Pursuant to Pleas v. City of Seattle, 112 Wn.2d 794, 804, 774 P.2d 1158 (1989), the issue should be treated as an affirmative defense. See generally the Comment to WPI 352.03 (Tortious Interference—Improper Purpose—Improper Means—Definitions).

Washington courts concur that "one who in good faith asserts a legally protected interest of his own that he believes may be impaired by the performance of a contract between others is not guilty of tortious interference." Roy v. Cunningham, 46 Wn.App. 409, 416, 731 P.2d 526 (1986); see also Olympic Fish Prods., Inc. v. Lloyd, 93 Wn.2d 596, 611 P.2d 737 (1980) (corporate officer, acting in good faith, i.e., with intent to benefit the corporation, not liable for inducing corporation to violate contract); Moore v. Commercial Aircraft Interiors, LLC, 168 Wn.App. 502, 512, 278 P.3d 197 (2012) ("Exercising in good faith one's legal interests is not improper interference."); Schmerer v. Darcy, 80 Wn.App. 499, 910 P.2d 498 (1996) (trial court properly dismissed claim for tortious interference when lienholder was seeking to protect legitimate interest). Such a showing, where unrebutted, is dispositive. Moore v. Commercial Aircraft Interiors, LLC, 168 Wn.App. at 511 (citing Brown v. Safeway Stores, Inc., 94 Wn.2d 359, 375, 617 P.2d 704 (1980)).

Similarly, if two parties have separate contracts with a third party, "each may resort to any legitimate means at his disposal to secure performance of his contract even though the necessary result will be to cause a breach of the other contract." Dauphin v. Smith, 42 Wn.App. 491, 495, 713 P.2d 116 (1986). See also DeWolf & Allen, 16A Washington Practice, Tort Law and Practice § 23.8 (4th ed.).

When the defendant's interest is merely one of prospective economic advantage, not yet realized, the defendant has no such justification. Keeton, Prosser and Keeton on Torts § 129, at 987 (5th ed.). Thus, there is a clear distinction between prospective and current interests, and only interference based upon the latter is considered justified.

With regard to financial interests in the affairs of others, see Re-

statement (Second) of Torts § 769 comment b (1979), which provides that a defendant having a financial interest in the business of the person induced is automatically shielded from liability, provided that the defendant does not employ wrongful means and acts to protect his own interests. This automatic immunity, however, applies only to the tort of interference with prospective economic advantage, and not to the tort of inducing breach of contract.

Competition does not justify a competitor's inducing a breach of plaintiff's existing contract; under certain circumstances, however, competition can justify interfering with plaintiff's business expectancies, including plaintiff's existing contracts terminable at will. See Restatement (Second) of Torts § 768 (1979). See further discussion in the Comment to WPI 352.05 (Tortious Interference with Business Expectancy—Affirmative Defense—Competition).

For a list of other defenses enumerated by the second Restatement, see the Comment to WPI 352.03 (Tortious Interference—Improper Purpose—Improper Means—Definitions).

[Current as of September 2018.]

WPI 352.05

TORTIOUS INTERFERENCE WITH BUSINESS EXPECTANCY—AFFIRMATIVE DEFENSE—COMPETITION

(Name of defendant) **claims that [his] [her] [its] conduct was justified because it occurred during the course of competition between** (name of defendant) **and** (name of plaintiff).

To establish the defense of competition, (name of defendant) **has the burden of proving each of the following propositions:**

(1) That the conduct of (name of defendant) **related to competition between** (name of defendant) **and** (name of plaintiff) **for the business of** (name of third party)**;**

(2) That (name of defendant's) **purpose was, at least in part, to advance** (name of defendant's) **interest in competing with** (name of plaintiff)**, and was not motivated solely by bad faith or ill will; and**

(3) That (name of defendant) **did not use wrongful means to compete.**

NOTE ON USE

Use this instruction with WPI 352.02.01 (Tortious Interference with Business Expectancy—Burden of Proof on the Issues—With Affirmative Defense) in a tortious interference with business expectancy case, when warranted by the evidence. Do not use this instruction in a tortious interference with contract case, unless it is a contract terminable at will.

COMMENT

According to Pleas v. City of Seattle, 112 Wn.2d 794, 804, 774 P.2d 1158 (1989), even though proof of improper purpose or improper means is now part of the plaintiff's prima facie case, "matters of privilege or justification continue to be affirmative defenses to be raised by the defendant." Traditionally, such privileges and justifications have included competition. See Restatement (First) of Torts § 768 (1939);

Island Air, Inc. v. LaBar, 18 Wn.App. 129, 145, 566 P.2d 972 (1977) (trial court properly awarded damages for tortious interference when competitor's use of confidential information constituted improper means). For a list of other such privileges as set forth in the Restatement, see the Comment to WPI 352.03 (Tortious Interference—Improper Purpose—Improper Means—Definitions).

Competition is one of the most frequently raised defenses. The elements are set out in Island Air, Inc. v. LaBar, 18 Wn.App. at 142, drawing from the Restatement (First) of Torts § 768 (1939):

> § **768.** Privilege of Competitor.
>
> (1) One is privileged purposely to cause a third person not to enter into or continue a business relation with a competitor of the actor if:
>
> (a) the relation concerns a matter involved in the competition between the actor and the competitor, and
>
> (b) the actor does not employ improper means, and
>
> (c) the actor does not intend thereby to create or continue an illegal restraint of competition, and
>
> (d) the actor's purpose is at least in part to advance his interest in his competition with the other.

The defense of justification or privilege on the basis of competition is only available if the conduct constituting the interference is not unlawful. Conduct that is unlawful can never fit the description of being "justified" or "privileged." If the plaintiff challenges the legality of the defendant's conduct, the question is one for the court rather than the jury. If the court determines that the conduct was not unlawful, then it remains for the jury to determine whether the surrounding circumstances justify the conduct. Restatement (Second) of Torts § 767, cmt. l (1979). The WPI Committee follows the formulation of the Restatement (Second) by including the absence of wrongful means in the affirmative defense, even though proof of wrongful means is now, following *Pleas*, also a part of the plaintiff's prima facie case.

See also WPI 352.03 (Tortious Interference—Improper Purpose—Improper Means—Definitions) and its Comment.

[Current as of September 2018.]

WPI 352.06

TORTIOUS INTERFERENCE WITH BUSINESS EXPECTANCY—AFFIRMATIVE DEFENSE—FINANCIAL INTEREST

(Name of defendant) **claims that even if [his] [her] [its] conduct interfered with** (name of plaintiff's) **prospective business relationship or future contract, that conduct was justified because** (name of defendant) **was acting reasonably to protect [his] [her] [its] financial interest from being harmed.**

To establish the defense of financial interest, (name of defendant) **has the burden of proving each of the following propositions:**

(1) That prior to any conduct of (name of defendant) **interfering with a business relationship or future contract of** (name of plaintiff), (name of defendant) **had a financial interest connected to** (describe the plaintiff's prospective relationship)**; and**

(2) That (name of defendant) **did not use wrongful means to protect that interest from harm.**

NOTE ON USE

Use this instruction with WPI 352.02.01 (Tortious Interference with Business Expectancy—Burden of Proof on the Issues—With Affirmative Defenses) in an appropriate case. Do not use this instruction in a tortious interference with contract case, unless it is a contract terminable at will.

This instruction may be modified if the interest sought to be protected is better described as legal rather than financial. See the Comment below.

COMMENT

The instruction is derived from a jury instruction proposed by the ABA. Nelson & Fisher, Am. Bar Ass'n Section of Litigation, Model Jury Instructions: Business Torts Litigation § 2.9.3 (4th ed.). In light of the wording of related sections from the Restatement (Second), the second

element requires proof that wrongful means were not used, rather than proof of "reasonable" conduct as suggested by the ABA model instruction. See Restatement (Second) of Torts §§ 769, 771 (1979). See also Calbom v. Knudtzon, 65 Wn.2d 157, 163, 396 P.2d 148 (1964); Quadra Enterprises v. R. A. Hanson Co., 35 Wn.App. 523, 529 n.3, 667 P.2d 1120 (1983).

For an analogous issue, see Restatement (Second) of Torts § 773 (1979). It has been held that even if all other elements of a cause of action for tortious interference with business expectancy are present, "interference is justified as a matter of law if the interferer has engaged in the exercise of an absolute right equal or superior to the right which was invaded." Plumbers & Steamfitters Union Local 598 v. WPPSS, 44 Wn.App. 906, 920, 724 P.2d 1030 (1986) (interferer's right to protect its own property from trespass justified interference with business expectancy). This high standard must be met only when the privilege is asserted to exist as a matter of law, rather than as a question of disputed fact. Dauphin v. Smith, 42 Wn.App. 491, 495 n.3, 713 P.2d 116 (1986).

For a comparable analysis of the privilege of a public official or employee to act within the scope of statutory duties, see Stidham v. Dep't of Licensing, 30 Wn.App. 611, 614–15, 637 P.2d 970 (1981) (privilege to invade plaintiff's interest in furtherance of a social interest of greater public import).

See the Comment to WPI 352.03 (Tortious Interference—Improper Purpose—Improper Means—Definitions) for a discussion of affirmative defenses and their relation to proper or improper conduct.

[Current as of September 2018.]

PART XIX

INVOLUNTARY TREATMENT

CHAPTER 360 MENTAL ILLNESS

CHAPTER 365 INVOLUNTARY TREATMENT—SEXUALLY VIOLENT PREDATORS

CHAPTER 360

MENTAL ILLNESS

WPI 360.00	Introduction
WPI 360.01	Advance Oral Instruction—Mental Illness—Involuntary Treatment—Introductory
WPI 360.02	Conclusion of Trial—Introductory Instruction—Mental Illness—Involuntary Treatment
WPI 360.03	Mental Illness—Involuntary Treatment—Explanation
WPI 360.04	Mental Illness—Involuntary Treatment—90 Days
WPI 360.05	Mental Illness—Involuntary Treatment—180 Days
WPI 360.05.01	Likelihood of Repeating Similar Acts—Factors
WPI 360.05.02	Less Restrictive Alternative—Mental Illness—Involuntary Treatment
WPI 360.05.03	In Need of Assisted Outpatient Treatment—Definition
WPI 360.06	Burden of Proof—Mental Illness—Involuntary Treatment
WPI 360.10	Mental Disorder—Definition Mental Disorder Means Any Organic, Mental, or Emotional Impairment That Has Substantial Adverse Effects on the Individual's Cognitive or Volitional Functions.
WPI 360.11	Custody—Mental Illness—Definition
WPI 360.12	Gravely Disabled—Mental Illness—Definition
WPI 360.13	Likelihood of Serious Harm—Mental Illness—Definition
WPI 360.13.01	Overt Act—Recent—History of Violent Acts—Violent Act—Definitions
WPI 360.14	Mental Illness—Respondent's Failure to Testify
WPI 360.15	Mental Illness—Expert Testimony—Limitation on Consideration of Evidence

WPI 360.20 Concluding Instruction—Mental Illness—Involuntary Treatment
WPI 360.21 Special Verdict Form [A] (90 Days)—Mental Illness—Involuntary Treatment
WPI 360.22 Special Verdict Form [A] (180 Days)—Mental Illness—Involuntary Treatment
WPI 360.23 Special Verdict Form [B]—Mental Illness—Involuntary Treatment—in Need of Assisted Outpatient Treatment

WPI 360.00

INTRODUCTION

Commitment proceedings are civil in nature. In re Detention of McLaughlin, 100 Wn.2d 832, 676 P.2d 444 (1984). Mental illness commitment proceedings are governed by RCW Chapter 71.05 and by the Superior Court Mental Proceedings Rules (MPR) (although many of these court rules address non-jury issues).

These instructions are to be used in trials for 90-day and 180-day involuntary commitments. These instructions are not intended for use in proceedings for 14-day commitments or in proceedings for the civil commitment of sexual predators under RCW Chapter 71.09.

[Current as of December 2016.]

WPI 360.01

ADVANCE ORAL INSTRUCTION—MENTAL ILLNESS—INVOLUNTARY TREATMENT—INTRODUCTORY

Part 1—Before Prospective Jurors are Questioned:

This trial is to determine whether a person should be required to involuntarily receive mental health treatment because of a mental disorder. The first stage of the trial is the jury selection, which is sometimes called voir dire.

The purpose of this process is to make sure that we select a jury that is free from any outside or pre-existing bias that might interfere with the jury's ability to fairly decide the case based on the evidence and the law that you receive in this courtroom.

You have already met [Mr.] [Ms.] (name)**, our court bailiff. The bailiff's job is to assist you. If there is anything we can do to better accommodate you as a juror, please let the bailiff know. The bailiff will involve me if that is necessary. Please follow any instructions that [he] [she] gives you.**

The court clerk is [Mr.] [Ms.] (name)**. The clerk's job is to mark and handle exhibits and other significant papers.**

[The court reporter is [Mr.] [Ms.] (name)**. It is the court reporter's job to take verbatim notes of the proceedings.]**

[In this courtroom we record all proceedings with a [video] [audio] recording system. All of the proceedings are preserved to create a "court record."]

This case was commenced by the filing of a petition by (name of petitioner)**. The petitioner is represented by** (name of counsel)**. The petition was filed against** (name of respondent)**, who is represented by** (name of counsel)**.**

The petition alleges that the respondent,(identify respondent), has a mental disorder requiring involuntary treatment. [The petition further alleges that involuntary treatment is required because the respondent presents a [a likelihood of serious harm] [is gravely disabled] [has been determined to be incompetent on felony charges, criminal charges have been dismissed, has committed acts constituting acts constituting a felony, and has a substantial likelihood of committing similar felony acts] [has previously been determined to have been found incompetent on felony criminal charges and committed acts constituting a felony and the petitition alleges that the respondent continues to present a likelihood of committing similar felony acts] and/or [is in need of assisted outpatient treatment]].

It is important that you discharge your duties without discrimination, meaning that bias regarding the race, color, religious beliefs, national origin, sexual orientation, gender, or disability of any party, any witnesses, and the lawyers should play no part in the exercise of your judgment throughout the trial. These are called "conscious biases"—and, when answering questions, it is important, even if uncomfortable for you, to share these views with the lawyers.

However, there is another more subtle tendency at work that we must all be aware of. This part of human nature is understandable but must play no role in your service as jurors. In our daily lives, there are many issues that require us to make quick decisions and then move on. In making these daily decisions, we may well rely upon generalities, even what might be called biases or prejudices. That may be appropriate as a coping mechanism in our busy daily lives but bias and prejudice can play no part in any decisions you might make as a juror. Your decisions as jurors must be based solely upon an open-minded, fair consideration of the evidence that comes before you during trial.

In a moment, I am going to ask you some background questions and the lawyers will also have a chance to follow up with some questions of their own. Most importantly, you are to look within yourselves and see if there is anything there in your life experiences or your personal beliefs that might be such a strong influence that it would overcome your ability to serve as a fair and impartial juror. These questions may sometimes involve issues that are sensitive for you. If you are uncomfortable answering any particular question in front of the other jurors, please let me know or notify the bailiff. We may then discuss other ways to handle this question.

Before any questions are asked, an oath or affirmation will be administered. All of your answers must be open, honest, and forthright. At this time, I ask that you please rise, raise your right hand, and [I] [the clerk] will administer this oath.

> "Do you solemnly swear or affirm that you will truthfully answer such questions as may be asked of you by the court or the attorneys concerning your qualifications to act as jurors in this case? [Please respond.]"

The fact that a petition has been filed is not to be considered by you as any indication of the truth of the allegations contained in that petition.

(Identify petitioner), has the burden of proving each element of [its] [his] [her] case by clear, cogent, and convincing evidence.

(Name of respondent) has the right to remain silent from the time of [his] [her] detention and is not required to testify. If [he] [she] does not testify, that decision cannot be used to infer a mental disorder or prejudice [him] [her] in any way.

It is your duty as a jury to decide the facts in this case

based upon the evidence presented to you during this trial. Evidence is a legal term. Evidence includes such things as testimony of witnesses, documents, or other physical objects.

During your deliberations, you must apply the law to the facts that you find to be true. It is your duty to accept the law as I give it to you, regardless of what you personally believe the law is or what you think it ought to be. You are to apply the law you receive from me to the facts and in this way decide the case.

(The judge then explains the procedure for jury selection and jury selection is conducted.)

Part 2—After Jury is Selected:

I will now say a few words about the role and function each of us plays during a jury trial. Jury selection is important but what jurors say in jury selection is not evidence. From this point forward, it is essential that all of your decisions be based upon the evidence and the law that come to you in this courtroom and only in this courtroom.

You must not allow yourself to be exposed to any outside information about this case. Do not permit anyone to discuss or comment about it in your presence, and do not remain within hearing of such conversations. This includes electronic conversations as well as oral ones. You must keep your mind free of outside influences so that your decision will be based entirely on the evidence presented during the trial and on my instructions to you about the law.

Until you are dismissed at the end of this trial, you must avoid outside sources such as newspapers, magazines, blogs, the internet, or radio or television broadcasts which may discuss this case or issues involved in this trial. If you start to hear or read information about anything

related to the case, you must act immediately so that you no longer hear or see it. By giving this instruction I do not mean to suggest that this particular case is newsworthy; I give this instruction in every case.

During the trial, do not try to determine on your own what the law is. Do not seek out any evidence on your own. Do not consult dictionaries or other reference materials. Do not conduct any research into the facts, the issues, or the people involved in this case. This means you may not use [Google or other internet search engines] [internet resources] to look into anything at all related to this case. Do not inspect the scene of any event involved in this case. If your ordinary travel will result in passing or seeing the location of any event involved in this case, do not stop or try to investigate. You must keep your mind clear of anything that is not presented to you in this courtroom.

During the trial, do not provide information about the case to other people, including any of the lawyers, parties, witnesses, your friends, members of your family, or members of the media. If necessary, you may tell people (such as your employer or your child's daycare provider) that you are a juror and let them know when you need to be in court. If people ask you for more details, you should tell them that you are not allowed to talk about the case until it is over.

I want to emphasize that the rules prohibiting discussions include your electronic communications. You must not send or receive information about anything related to the case by any means, including by text messages, email, telephone, internet chat, blogs, or social networking web sites. Do not even mention being on a jury when using social media, such as updating your status on Facebook or sending a message on Twitter. You don't want to do anything that will invite others to talk to you about your jury duty.

In short, do not communicate with anyone, by any means, concerning what you see or hear in the courtroom, and do not try to find out more about anything related to this case, by any means, other than what you learn in the courtroom. These rules ensure that the parties will receive a fair trial. If you have any questions about these restrictions, please contact [the bailiff] [(insert other appropriate staff person)].

If you become exposed to any information other than what you learn in the courtroom, that could be grounds for a mistrial. A mistrial would mean that all of the work that you and your fellow jurors put into this trial will be wasted. Re-trials are costly and burdensome to the parties and the public. Also, if you communicate with others in violation of my orders, you could be fined or held in contempt of court.

After you have delivered your verdict, you will be free to do any research you choose and to share your experiences with others.

[Remember that all phones, laptops, and other communication devices must be turned off while you are in court and while you are in deliberations.]

Throughout this trial, you must come and go directly from the jury room. [Follow the bailiff's instructions about where to wait in the courthouse and areas that you should avoid.] Do not remain in the hall or courtroom, as witnesses and parties may not recognize you as a juror, and you may accidentally overhear some discussion about this case. Even a communication about an unrelated topic might give a bad impression to others, therefore I have instructed the lawyers, parties, and witnesses not to greet or talk to you during trial.

I want to comment on one other aspect of your role and that is the importance of keeping an open mind throughout the various stages of these proceedings. The

trial has a sensible order to it as each side presents and develops its position.

First: The lawyers will have an opportunity to make opening statements outlining the testimony of witnesses and other evidence that they expect to be presented during trial.

Next: The petitioner will present the testimony of witnesses or other evidence to you. When the petitioner has finished, the respondent may, but need not, present the testimony of witnesses or other evidence. Each witness may be cross-examined by the other side.

Next: When all of the evidence has been presented to you, I will tell you what law applies to this case. The law that applies will be set out in written instructions, which I will read out loud. You will have [individual copies of] the written instructions with you in the jury room during your deliberations.

Next: The lawyers will make closing arguments.

Finally: You will be taken to the jury room by the bailiff where you will select a presiding juror. The presiding juror will preside over your discussions of the case, which are called deliberations. You will then deliberate in order to reach a decision, which is called a "verdict." During your deliberations, you must apply the law that I provide to you in my instructions to the facts that you find to have been proven.

Until you are in deliberations, you must make sure you are maintaining open minds. If you were to form premature opinions about the case, this would interfere with your ability to get the benefit of each of the subsequent stages.

The attorneys' role is to represent and advocate for the positions of their respective clients. The lawyers'

remarks, statements, and arguments are intended to help you understand the evidence and apply the law. However, the lawyers' statements are not evidence or the law. The evidence is the testimony and the exhibits. The law is contained in my instructions. You must disregard anything the lawyers say that is at odds with the evidence or the law in my instructions.

You may hear objections made by the lawyers during trial. Each party has the right to object to questions asked by another lawyer. These objections should not influence you. Do not make any assumptions or draw any conclusions based on a lawyer's objections.

When there is an objection, it is my job to rule on it. One of my duties as judge is to decide whether or not evidence should be admitted during this trial. What this means is that I must decide whether or not you should consider evidence offered by the parties. For example, if a party offers a photograph as an exhibit, I will decide whether it is admissible. Do not be concerned about the reasons for my rulings. You must not consider or discuss any evidence that I do not admit or that I tell you to disregard.

Our state constitution prohibits a trial judge from making a comment on the evidence. For example, it would be improper for me to express my personal opinion about the value of a particular witness's testimony. Although I will not intentionally do so, if it appears to you that I have indicated my personal opinion concerning any evidence, you must disregard that opinion entirely. The reason for this constitutional rule is that it is solely the role of the jurors to weigh and evaluate the evidence in the case.

[You will be allowed to propose written questions to witnesses after the lawyers have completed their questioning. You may ask questions in order to clarify the testimony, but you are not to express any opinion about the testimony or argue with a witness. If you ask any ques-

tions, remember that your role is that of a neutral fact finder, not an advocate.]

[Before I excuse each witness, I will offer you the opportunity to write out a question on a form provided by the court. Do not sign the question. I will review the question to determine if it is legally proper.]

[There are some questions that I will not ask, or will not ask in the wording submitted by the juror. This might happen either due to the rules of evidence or other legal reasons, or because the question is expected to be answered later in the case. If I do not ask a juror's question, or if I rephrase it, do not attempt to speculate as to the reasons and do not discuss this circumstance with the other jurors.]

[By giving you the opportunity to propose questions, I am not requesting or suggesting that you do so. It will often be the case that a lawyer has not asked a question because it is legally objectionable or because a later witness may be addressing that subject.]

All proceedings in this trial are recorded [by the court reporter] [through electronic means]. Deliberating juries are rarely, if ever, given access to transcripts or recordings of trial testimony. For this reason, you must pay close attention as the testimony is being presented.

The related point is that you are allowed to take notes during trial. I am not instructing you to take notes, nor am I encouraging you to do so. Taking notes may interfere with your ability to listen and observe. If you choose to take notes, I must remind you to listen carefully to all testimony and to carefully observe all witnesses.

At an appropriate time, the bailiff will provide a note pad and a pen or pencil to each of you. Your juror number will be on the front page of the note pad. You must take notes on this pad only, not on any other paper. You must

not take your note pad from the courtroom or the jury room for any reason. When you recess during the trial, please (insert appropriate instruction; see Note on Use). At the end of the day, the note pads must be left (insert appropriate instruction; see Note on Use). While you are away from the courtroom or the jury room, no one else will read your notes.

You must not discuss your notes with anyone or show your notes to anyone until you begin deliberating on your verdict. This includes other jurors. During deliberation, you may discuss your notes with the other jurors or show your notes to them.

You are not to assume that your notes are necessarily more accurate than your memory. I am allowing you to take notes to assist you in remembering clearly, not to substitute for your memory. You are also not to assume that your notes are more accurate than the memories or notes of the other jurors.

After you have reached a verdict, your notes will be collected and destroyed by the bailiff. No one will be allowed to read them.

Now that you have been empaneled as jurors, you need to take another oath. Please stand and raise your right hand and [I] [the clerk] will administer this oath.

> "Do you solemnly swear or affirm that you will well and truly try this case and render a true verdict based upon the evidence and the law? Please respond."

Having taken your oath as jurors, you are now what the law calls officers of this court. As such, you must not let your emotions overcome your rational thought process. You must decide the case solely on the evidence and the law before you and must not be influenced by any personal likes or dislikes, opinions, prejudices, sympathy, or biases, including unconscious bias. Unconscious biases

are stereotypes, attitudes, or preferences that people may consciously reject but may be expressed without conscious awareness, control, or intention. Like conscious bias, unconscious bias, too, can affect how we evaluate information and make decisions.

To assure that all parties receive a fair trial, you must act impartially with an earnest desire to reach a just and proper verdict.

Thank you for your willingness to serve this court and our system of justice.

NOTE ON USE

This is not one of the written instructions on the law. Part 1 of this instruction is to be read to the panel of prospective jurors before starting jury selection. Part 2 is to be read after jury selection has been completed. A decision must be made as to how much of this advance oral instruction, WPI 360.01, is appropriate in a particular case.

In the paragraphs addressing juror note-taking, insert an appropriate direction to jurors regarding where to leave their notes during court recesses, such as "leave your note pad on your chair" or "take your note pad with you to the jury room." Also insert an appropriate instruction regarding where jurors are to leave their note pads at the end of the day, such as "in the jury room" or "on your chair."

For a discussion of the bracketed paragraphs addressing jurors' questions for witnesses, see the Comment below.

Do not use the bracketed reference to the court reporter when the proceedings are recorded by video or audio recorder. Use the bracketed language on jurors receiving individual copies of the final instructions as applicable.

The instruction's paragraphs about prohibited juror communications and avoiding outside information about the trial are intended for routine cases. For a higher publicity case, the judge should consider expanding on these provisions.

COMMENT

This instruction has been revised for this edition. This instruction

is modeled primarily after the standard advance oral instruction for civil cases, see WPI 1.01 (Advance Oral Instruction—Beginning of Proceedings), as modified to fit mental illness commitment cases.

See WPI 360.06 (Burden of Proof—Involuntary Treatment), for a discussion of the burden of proof for involuntary treatment proceedings.

Unconscious and conscious bias. This instruction incorporates, in several places, new language concerning both unconscious and conscious bias.

In drafting the language on unconscious and conscious bias, the WPI Committee carefully reviewed the preliminary oral instructions recently adopted for use in criminal cases in the United States District Court, Western District of Washington. There are slight modifications and additions designed, in part, to avoid the state constitutional provision on commenting on the evidence. Wash. Const. art IV, § 16. The original instructions from the district court are set forth at http://www.wawd.uscourts.gov/jury/unconscious-bias (last visited November 15, 2017).

A trial court is not constitutionally-required to *sua sponte* question potential jurors about potential racial bias or to instruct on such issues. State v. Davis, 141 Wn.2d 798, 826–34, 10 P.3d 977 (2000) (death penalty case). The *Davis* court discussed the possibility of "unnecessarily bringing [issues of race] to the attention of jurors" by such inquiry when not requested by defense counsel. *Davis* relied heavily on jurisprudence from the United States Supreme Court, in particular on the death penalty case of Turner v. Murray, 476 U.S. 28, 106 S.Ct. 1683, 90 L.Ed.2d 27 (1986), and contains a thorough review of federal case law.

The United States Supreme Court in Peña-Rodriguez v. Colorado, ___ U.S. ___, 137 S.Ct. 855, 869, 197 L.Ed.2d 107 (2017), concluded that the general rule against impeaching a jury verdict must fall when a juror has indicated that he or she relied on racial animus or stereotypes in reaching the verdict. In Turner v. Stime, 153 Wn.App. 581, 222 P.3d 1243 (2009), the court concluded that statements of clear racial bias made by a juror concerning plaintiff's counsel do not "inhere in the verdict" and that it was proper for the trial court to grant a new trial upon proof that such statements were made.

The Washington Supreme Court has emphasized the dangers of racial bias impacting the fairness of a trial. For example, in State v. Monday, 171 Wn.2d 667, 257 P.3d 551 (2011), the court unanimously reversed a conviction for prosecutorial misconduct in referring to an "anti-snitch code" allegedly prevalent in the African American community, concluding that when racial bias is shown, it becomes the State's burden to show harmlessness beyond a reasonable doubt. See

also City of Seattle v. Erickson, 188 Wn.2d 721, 398 P.3d 1124 (2017) (when the sole member of a racially cognizable group has been subject to a preemptory challenge by the State, a prima facie case of discriminatory purpose has been established).

Voir Dire. The term voir dire has been replaced by jury selection in several places in the instruction for the purpose of better juror comprehension. No substantive change is intended.

Questioning jurors individually. Although this is more common in criminal cases than in civil, the subject matter of the trial may make it necessary to conduct individual questioning on particularly sensitive or private matters. If a juror expresses discomfort in answering such questions in front of the entire panel or if the court determines that all jurors should be questioned individually given the subject matter, individual questioning can occur. Individual questioning may also be warranted when there is a concern that the panel may be unduly influenced by the answers of other potential jurors or if there has been substantial media interest in the case. However, the courtroom must not be closed to the public unless the *Ishikawa* factors are met and the court's findings included in the record. Seattle Times Co. v. Ishikawa, 97 Wn.2d 30, 640 P.2d 716 (1982). Accord, State v. Bone-Club, 128 Wn.2d 254, 906 P.2d 325 (1995).

Absent *Ishikawa* findings on the record, the courtroom is open during individual questioning of prospective jurors to all members of the public and to the media. It is only the other jurors who are not present for the individual questioning. See State v. Strode, 167 Wn.2d 222, 217 P.3d 310 (2009). It should be noted that when a juror questionnaire is used as part of jury selection, review of the completed questionnaire in chambers, as a general rule, does not violate the clear mandate of the Washington Constitution, Article I, § 10 that "justice in all cases shall be administered openly." State v. Slert, 181 Wn.2d 598, 602–608, 334 P.3d 1088 (2014). Although the Supreme Court in *Slert* reversed the Court of Appeals as to its specific conclusion, the Court of Appeals decision does contain a thorough discussion of the law in this area. State v. Slert, 169 Wn.App. 766, 282 P.3d 101 (2012).

Confidentiality. Under RCW 71.05.620, files and records of court proceedings under RCW Chapter 71.05 are closed to the public because of the sensitivity of the information contained in them. Former MPR 1.3 presumptively closed the courtroom to the public, as well. However, that rule was held to be unconstitutional, and the trials are now presumptively open to the public, although the court files remain under seal. In re Detention of D.F.F., 172 Wn.2d 37, 41–42, 256 P.3d 357 (2011). A party may seek to have the courtroom closed but any person or party in the courtroom, including the public or press, may object to such a closure. The court must conduct a "*Bone-Club* analysis" on the

record before the court may close the courtroom. See State v. Bone-Club, 128 Wn.2d 254, 906. P.2d 325 (1995). No cases have addressed whether, after a trial is over, the jurors may disclose the identity of the respondent or discuss the content of the respondent's medical records if those records are admitted at trial in open court. Nor have the courts determined whether jurors should be instructed on the confidentiality of the content of a respondent's medical records.

Jurors Proposing Questions for Witnesses. CR 43(k) allows jurors to submit written questions to witnesses in civil cases. The civil rules apply to trials under the Involuntary Treatment Act. See CR 81(a) (applicability of civil rules to "special proceedings"); MPR 3.4(a); In re Detention of McLaughlin, 100 Wn.2d 832, 676 P.2d 444 (1984). In the case of In re Detention of Greenwood, 130 Wn.App. 277, 122 P.3d 747 (2005), the court held that the jury was properly permitted to submit written questions in a sexually violent predator civil commitment trial. While cases have approved the use of questions in other types of civil proceedings, no cases have addressed the practice in proceedings under RCW Chapter 71.05.

The Washington State Jury Commission recommended that the judge use the following procedures for handling juror questions submitted for witnesses:

1. At the conclusion of each witness's testimony, the court asks if jurors have written questions, which are brought to the judge;

2. Outside the presence of the jury, counsel are given the opportunity to make objections to the question or to suggest modifications to the question, by passing the written question between counsel and the court during a side-bar conference or by excusing jurors to the jury room;

3. The judge asks the question of the witness;

4. Counsel are permitted to ask appropriate follow-up questions; and

5. The written questions are made part of the record.

Washington State Jury Commission Report, Recommendation 33 (July 2000) (narrative section). Additionally, the judge may rephrase, reword, or refuse to allow particular juror questions, see CR 43(k) and CRLJ 43(k), and objections to the written questions should be made a part of the record.

Juror note-taking. Jurors must be permitted to take notes during

civil trials. However, the judge has discretion in deciding whether to allow jurors to review their own notes in the jury room during recesses. CR 47(j); CRLJ 38(h).

Copies of instructions. The instruction includes a bracketed phrase informing jurors that at the end of the trial they will each receive a copy of the final instructions. The Washington State Jury Commission has recommended that this practice be adopted, to the extent feasible. Washington State Jury Commission's Report to the Board for Judicial Administration, Recommendation 35 (July 2000) (for text see Appendix G of this volume). This practice helps jurors to more readily understand the final instructions and improves their deliberation process. See the Jury Commission's Report, Recommendation 35 (accompanying narrative section).

Repeating testimony. See the Comment to WPI 6.19 (Jurors Rehearing Trial Testimony—Cautionary Instruction).

Improper juror communications. The instruction warns jurors, after they have been selected to serve on a case, against participating in improper communications and research about the case. Some of this information, however, should be given to potential jurors before they arrive in the courtroom for jury selection. Courts should make sure that potential jurors who are reporting for jury duty know that they should not seek out or receive any information about pending legal cases or issues.

Because it is juror misconduct to "extra-judicially acquire case-specific information during the course of the trial," State v. Tigano, 63 Wn.App. 336, 341, 818 P.2d 1369, 1372 (1991), it is important to so notify the jurors at the outset.

[Current as of March 2018.]

WPI 360.02

CONCLUSION OF TRIAL—INTRODUCTORY INSTRUCTION—MENTAL ILLNESS—INVOLUNTARY TREATMENT

It is your duty to decide the facts in this case based upon the evidence presented to you during this trial. It also is your duty to accept the law as I explain it to you, regardless of what you personally believe the law is or what you personally think it should be. You must apply the law that I give you to the facts that you decide have been proved, and in this way decide the case. By applying the law to the facts, you will be able to decide this case.

The evidence that you are to consider during your deliberations consists of the testimony that you have heard from witnesses [, and the exhibits that I have admitted,] during the trial. If evidence was not admitted or was stricken from the record, then you are not to consider it in reaching your verdict.

[Exhibits may have been marked by the court clerk and given a number, but they do not go with you to the jury room during your deliberations unless they have been admitted into evidence. The exhibits that have been admitted will be available to you in the jury room.]

In order to decide whether the petitioner's allegations have been proved, you must consider all of the evidence that I have admitted. Each party is entitled to the benefit of all of the evidence, whether or not that party introduced it.

You are the sole judges of the credibility of each witness and of the value or weight to be given to the testimony of each witness. In assessing credibility, you must avoid bias, conscious or unconscious, including bias based on religion, ethnicity, race, sexual orientation, gender or disability.

In considering a witness's testimony, you may consider these things: the opportunity of the witness to observe or know the things [he] [she] testifies about; the ability of the witness to observe accurately; the quality of a witness's memory while testifying; the manner of the witness while testifying; any personal interest that the witness might have in the outcome or the issues; any bias or prejudice that the witness may have shown; the reasonableness of the witness's statements in the context of all of the other evidence; and any other factors that affect your evaluation or belief of a witness or your evaluation of his or her testimony.

One of my duties has been to rule on the admissibility of evidence. Do not be concerned during your deliberations about the reasons for my rulings on the evidence. If I have ruled that any evidence is inadmissible, or if I have asked you to disregard any evidence, then you must not discuss that evidence during your deliberations or consider it in reaching your verdict.

The law does not permit me to comment on the evidence in any way. I would be commenting on the evidence if I indicated my personal opinion about the value of testimony or other evidence. Although I have not intentionally done so, if it appears to you that I have indicated my personal opinion, either during trial or in giving these instructions, you must disregard it entirely.

As to the comments of the lawyers during this trial, they are intended to help you understand the evidence and apply the law. However, it is important for you to remember that the lawyers' remarks, statements, and arguments are not evidence. You should disregard any remark, statement, or argument that is not supported by the evidence or the law as I have explained it to you.

You may have heard objections made by the lawyers during trial. Each party has the right to object to questions asked by another lawyer. These objections should

not influence you. Do not make any assumptions or draw any conclusions based on a lawyer's objections.

As jurors, you have a duty to consult with one another and to deliberate with the intention of reaching a verdict. Each of you must decide the case for yourself, but only after an impartial consideration of all of the evidence with your fellow jurors. Listen to one another carefully. In the course of your deliberations, you should not hesitate to re-examine your own views and to change your opinion based upon the evidence. You should not surrender your honest convictions about the value or significance of evidence solely because of the opinions of your fellow jurors. Nor should you change your mind just for the purpose of obtaining enough votes for a verdict.

As jurors, you are officers of this court. You must not let your emotions overcome your rational thought process. You must reach your decision based on the facts proved to you and on the law given to you, not on sympathy, prejudice, or personal preference. To assure that all parties receive a fair trial, you must act impartially with an earnest desire to reach a proper verdict.

Finally, the order of these instructions has no significance as to their relative importance. They are all important. In closing arguments, the lawyers may properly discuss specific instructions, but you must not attach any special significance to a particular instruction that they may discuss. During your deliberations, you must consider the instructions as a whole.

NOTE ON USE

Give this general instruction in every mental illness case. Do not use this instruction in cases for the civil commitment of sexual predators.

Use WPI 1.03 (Direct and Circumstantial Evidence) if requested.

COMMENT

This instruction is adapted from WPI 1.02 (Introductory Instruction) to fit an Involuntary Treatment Act case.

In this edition, the WPI Committee has added an admonition that the jurors must not let bias, conscious or unconscious, influence their assessment of credibility. For further discussion of conscious or unconscious bias, see the Comment to WPI 1.01 (Advance Oral Instruction—Beginning of Proceeding).

This instruction does not address whether the jury may consider the respondent's courtroom demeanor in making its determination.

In State v. Barry, 179 Wn.App. 175, 317 P.3d 528 (2014), affirmed 183 Wn.2d 297, 352 P.3d 161 (2015), the court held that the evidence properly considered consists of the testimony of the witnesses and admitted exhibits; the courtroom demeanor of a defendant is itself not evidence and may not be considered by the jury. However, in Involuntary Treatment Act cases, an expert witness, present in the courtroom during the trial, frequently observes a respondent's courtroom demeanor or behavior and testifies regarding his or her observations as a part of the expert's opinion regarding the respondent's mental state. See, e.g., In re LaBelle, 107 Wn.2d 196, 215, 728 P.2d 138, 150 (1986) ("The State's other witness, Dr. Hyde, based his testimony on a personal interview with [the respondent], review of the medical charts and records, and observations during the hearing."). An expert's testimony about in-court observations of the respondent, subject to cross-examination, is evidence which a jury may consider.

[Current as of March 2018.]

WPI 360.03

MENTAL ILLNESS—INVOLUNTARY TREATMENT—EXPLANATION

(WITHDRAWN)

COMMENT

In former editions, WPI 360.03 provided jurors with an overview of the issues in mental illness commitment cases. The WPI Committee has withdrawn this instruction as redundant. The contents of this instruction are covered both in the advance oral instruction (WPI 360.01) and in the written instructions setting out the State's burden of proof (WPI 360.04 and 360.05).

[Current as of December 2016.]

WPI 360.04

MENTAL ILLNESS—INVOLUNTARY TREATMENT—90 DAYS

Before the respondent (fill in name) can be involuntarily treated for a period not to exceed 90 days, the petitioner must prove by clear, cogent, and convincing evidence that the respondent has a mental disorder and that [he] [she]:

[has threatened, attempted, or inflicted [physical harm upon [the person of another] [or] [himself] [herself]] [or] [substantial damage upon the property of another] after having been taken into custody for evaluation and treatment; and as a result of a mental disorder presents a likelihood of serious harm] [or]

[was taken into custody as a result of conduct in which [he] [she] attempted or inflicted physical harm upon [the person of another] [or] [himself] [herself] or substantial damage upon the property of others; and as a result of a mental disorder continues to present a likelihood of serious harm] [or]

[is gravely disabled as a result of a mental disorder] [or]

[is in need of assisted outpatient mental health treatment].

If you find that the respondent should be involuntarily treated, you must then decide whether the best interest of the respondent or others will be served by a less restrictive treatment that is an alternative to detention. Before the respondent can be detained for a period not to exceed 90 days, it must be proved by clear, cogent, and convincing evidence that no less restrictive treatment is in the best interest of the respondent or others.

NOTE ON USE

Use this instruction for 90-day involuntary treatment cases.

Under one set of circumstances, the instruction may also apply to a petition filed for 180-days ofinvoluntary treatment. See the discussion in the Comment to WPI 360.05 (Mental Illness—Involuntary Treatment—180 Days).

Select bracketed paragraphs as applicable.

Use WPI 360.06 (Burden of Proof—Mental Illness—Involuntary Treatment) and WPI 360.10 (Mental Disorder—Definition) with this instruction. As applicable, use WPI 360.05.03 (In Need of Assisted Outpatient Treatment), WPI 360.11 (Custody—Mental Illness—Definition), WPI 360.12 (Gravely Disabled—Mental Illness—Definition), and WPI 360.13 (Likelihood of Serious Harm—Mental Illness—Definition) with this instruction.

COMMENT

RCW 71.05.280, RCW 71.05.320(1). This instruction was revised for the 2017–2018 Supplement to 6A Washington Practice, Washington Pattern Jury Instructions: Civil (6th ed.) to more closely track the statutes and to reflect the 2015 change in the law adding "in need of assisted outpatient mental health treatment" as one of the grounds for involuntary treatment. RCW 71.05.280(5).

Constitutional requirements. This instruction's first paragraph conforms with the U.S. Supreme Court's opinion in Foucha v. Louisiana, 504 U.S. 71, 112 S.Ct. 1780, 118 L.Ed.2d 437 (1992). In that case, the court invalidated a Louisiana statute that permitted indefinite detention of insanity acquittees who are not mentally ill but who do not prove that they would not be dangerous. The court held that under the Due Process Clause, a state may confine a person for mental illness only if it shows that the person is both mentally ill and dangerous. See also the discussion below for constitutional issues related to commitments based on a felony.

Burden of proof. In In re Detention of McLaughlin, 100 Wn.2d 832, 676 P.2d 444 (1984), the court held that the respondent is entitled to an instruction stating that the burden of proof is upon the petitioner to prove each element of its case by the requisite standard. The WPI Committee concluded that WPI 360.04, as revised, meets this requirement. The requirement is also reflectedin a revised version of WPI 360.06 (Burden of Proof—Mental Illness—Involuntary Treatment).

Less restrictive alternative. RCW 71.05.320(2) mandates instructing on less restrictive treatment, as an alternative to detention

in the 90-day treatment situation. The jury must be instructed to consider a less restrictive treatment that is an alternative to detention whether or not evidence shows a less restrictive alternative is available. In re R.A.W., 104 Wn.App. 215, 15 P.3d 705 (2001).

[Current as of December 2016.]

WPI 360.05

MENTAL ILLNESS—INVOLUNTARY TREATMENT—180 DAYS

Before the respondent (fill in name) **can be involuntarily treated for a period not to exceed 180 days, the petitioner must prove by clear, cogent, and convincing evidence that the respondent has a mental disorder and that [he] [she]:**

[has threatened, attempted, or inflicted [physical harm upon the person of another] [or] [substantial damage upon the property of another] during the current period of court ordered treatment; and as a result of a mental disorder presents a likelihood of serious harm] [or]

[was taken into custody as a result of conduct in which [he] [she] attempted or inflicted serious physical harm upon the person of another, and continues to present, as a result of a mental disorder, a likelihood of serious harm] [or]

[has been determined to be incompetent and felony criminal charges have been dismissed pursuant tothat determination and has committed acts constituting the felony of (specify felony or felonies) **and as a result of [his] [her] mental disorder, presents a substantial likelihood of repeating similar acts; [it is not necessary to show intent, willfulness, or state of mind as an element of the felony]]**

[is in custody pursuant to previous findings that felony charges have been dismissed due to a determination of incompetency, [he] [she] has committed acts constituting the felony of (specify felony or felonies) **and as a result of [his] [her] mental disorder has a substantial likelihood of committing substantial felony acts and as a result of [his] [her] mental disorder or develop-**

mental disability continues to present a substantial likelihood of repeating acts similar to (specify felony or felonies found inprevious ITA court proceedings), **when considering the person's life history, progress in treatment, and the public safety] [or]**

[continues to be gravely disabled] [or]

[is in need of assisted outpatient mental health treatment].

If you find that the respondent should be involuntarily treated, you must then decide whether the best interest of the respondent or others will be served by a less restrictive treatment that is an alternative to detention. Before the respondent can be detained for a period not to exceed 180 days, it must be proved by clear, cogent, and convincing evidence that no less restrictive treatment is in the best interest of the respondent or others.

NOTE ON USE

Use this instruction for 180-day involuntary treatment cases.

Select bracketed paragraphs as applicable. If the conduct required by the second bracketed paragraph (see RCW 71.05.320(4)(b)), or the third bracketed paragraph (see RCW 71.05.320(4)(c)) was previously proven in a prior 90 or 180 day commitment hearing, then it is not necessary to prove such conduct again. If the fourth bracketed paragraph is selected, set forth the elements of the felony committed, excluding the element of intent, willfulness, or state of mind. Use the criminal pattern jury instructions, as necessary, for definitions of crimes. The fourth and fifth bracketed paragraphs may not be simultaneously used. The fourth bracketed paragraph is only for individuals who have had charges dismissed pursuant to RCW 10.77.086(4) and for whom the initial petition for civil commitment pursuant to RCW 71.05.280(3) has been filed. The fifth bracketed paragraph is only for individuals who have previously been committed pursuant to RCW 71.05.280(3) and additional involuntary treatment is now sought under RCW 71.05.320(4).

Use WPI 360.03 (Mental Illness—Involuntary Treatment—Explanation), WPI 360.06 (Burden of Proof—Mental Illness—Involuntary Treatment), and WPI 360.10 (Mental Disorder—Definition) with this instruction. Use WPI 360.05.03 (In Need of Assisted Mental Health

Treatment—Definition), WPI 360.11 (Custody—Mental Illness—Definition) and WPI 360.12 (Gravely Disabled—Definition) as applicable with this instruction.

COMMENT

RCW 71.05.320(2), RCW 71.05.280(3). This instruction was revised for the 2017–2018 Supplement to 6A Washington Practice, Washington Pattern Jury Instructions: Civil (6th ed.) because of statutory changes, including the 2015 change in the law adding "in need of assisted outpatient mental health treatment" as one of the grounds for involuntary treatment. RCW 71.05.280(5).

Constitutionality. The first paragraph of this instruction conforms with the U.S. Supreme Court's opinion in Foucha v. Louisiana, 504 U.S. 71, 112 S.Ct. 1780, 118 L.Ed.2d 437 (1992). In that case, the court invalidated a Louisiana statute that permitted indefinite detention of insanity acquittees who are not mentally ill but who do not prove that they would not be dangerous. The court held that under the Due Process Clause a state may confine a person for mental illness only if it shows that the person is both mentally ill and dangerous.

The statutes allowing involuntary commitment for persons found incompetent to stand trial on felony charges have been found constitutional. See In re Detention of McLaughlin, 100 Wn.2d 832, 676 P.2d 444 (1984) (the burden of proof, at a 90-day involuntary commitment proceeding, is proof by clear, cogent and convincing evidence); In re Patterson, 90 Wn.2d 144, 579 P.2d 1335 (1978) (overruled on other grounds). Practitioners should be aware, however, that *Patterson* might not have laid to rest all constitutional issues for proving dangerousness. These issues continue to be litigated in more recent civil commitment cases, including cases involving commitment of sexually violent predators under RCW Chapter 71.09.

RCW 71.05.280(3) permits commitment of a person adjudicated incompetent in criminal proceedings upon proof of "acts constituting a felony" but without needing to prove the mental state associated with the crime. One possible area of uncertainty, however, arises when the underlying felony consists only of an offense based upon threatening speech (i.e. felony harassment). In criminal prosecutions, the First Amendment of the United States Constitution requires proof of a "true threat," which is defined as "a statement made in a context or under such circumstances wherein a reasonable person would foresee the statement would be interpreted as a serious expression of intention to inflict bodily harm or to take the life of another person." State v. Kilburn, 151 Wn.2d 36, 43, 84 P.3d 1215, 1219 (2004). See also Comment to WPIC 2.24 (Threat—Definition). Washington's appellate courts have not yet decided whether the "true threat" requirement applies to civil commitment proceedings under RCW 71.05.280(3) when the underlying felony is based upon threatening speech.

In In re Detention of McLaughlin, 100 Wn.2d 832, 676 P.2d 444 (1984), the court held that the respondent is entitled to an instruction stating that the burden of proof is on the petitioner to prove each element of its case by the requisite standard. The WPI Committee concluded that WPI 360.05, as revised, meets this requirement. The requirement is also reflected in a revised version of WPI 360.06 (Burden of Proof—Mental Illness—Involuntary Treatment).

Facts proved in a previous proceeding. The instruction is drafted under the assumption that certain facts contained in the statutory elements were proved at the earlier commitment proceeding. See RCW 71.05.320(4). More specifically, if the commitment is being sought under the second paragraph, which involves previous infliction of harm pursuant to RCW 71.05.320(3)(b), or is being sought under the fifth paragraph, which involves a finding of incompetency on previous felony charges under RCW 71.05.280(3), the element of proving the respondent committed the prior acts will usually have been proved in the first commitment proceeding and need not be proved again. See RCW 71.05.320(3) ("If the conduct required to be proven in (b) and (c) of this subsection was found by a judge or jury in a prior trial under this chapter, it shall not be necessary to prove such conduct again.").

In re W.R.G., 110 Wn.App. 318, 40 P.3d 1177 (2002), suggests in dicta that the "taken into custody" language should similarly be deleted from the instruction if this fact was proved in an earlier proceeding.

Petition based on a felony, but commitment on other grounds. RCW 71.05.280(3) and RCW 71.05.320(1) allow for individuals referred to the state hospital following dismissal of felony criminal charges due to incompetency to be committed for up to 180 days, rather than the 90 days typically allowed under RCW 71.05.280. However, if a petition for 180 days of involuntary treatment is filed based on the felony grounds, but the felony grounds are not proven at trial and other grounds of commitment are proven, the order for treatment can only be for 90 days. See In re Detention of R.H., 178 Wn.App. 941, 316 P.3d 535 (2014).

Acts constituting a felony. RCW 71.05.320(2)(c) refers to RCW 71.05.280 and makes the fourth bracketed paragraph of this instruction applicable only if the acts committed constitute a felony, and excludes the elements of intent, willfulness, or state of mind.

Felony acts constituting a violent offense. RCW 71.05.280(3)(b) provides that for any person subject to commitment under the fourth bracketed paragraph where the charge underlying the finding of incompetence is for a felony classified as violent under RCW 9.94A.030, the court shall determine whether the acts the person committed constitute a violent offense under RCW 9.94A.030.

Less restrictive alternative. RCW 71.05.320(1) mandates

instructing on less restrictive treatment as an alternative to detention in the 90-day treatment situation. Although RCW 71.05.320 is not clear whether this requirement applies as well to 180-day commitment proceedings, case law suggests that it does. See In re R.A.W., 104 Wn.App. 215, 15 P.3d 705 (2001) (implicitly applying the less restrictive alternative requirements from RCW 71.05.320(1) to a 180-day petition brought pursuant to RCW 71.05.320(2)). The same result is also likely under equal protection analysis. See In re Dydasco, 135 Wn.2d 943, 959 P.2d 1111 (1998) (equal protection requires that a notice provision applying expressly only to 14-day commitments must also be applied to 90-day and 180-day commitments).

The jury must be instructed to consider a less restrictive treatment that is an alternative to detention whether or not evidence shows a less restrictive alternative is available. In re R.A.W., 104 Wn.App. 215, 221–23, 15 P.3d 705 (2001).

[Current as of December 2016.]

WPI 360.05.01

LIKELIHOOD OF REPEATING SIMILAR ACTS—FACTORS

In determining whether a person presents a substantial likelihood of repeating similar acts, you may consider the charged criminal behavior, the person's life history, the person's progress in treatment, and public safety, together with any other factors bearing on the question.

NOTE ON USE

This instruction should be given only when commitment is sought under the prong of 71.05.320 involving respondent's incompetence to stand trial on acts constituting a felony. In such a case, the instruction should be used with WPI 360.05 (Mental Illness—Involuntary Treatment—180 Days).

COMMENT

RCW 71.05.320.

For cases brought under RCW 71.05.320, involving a respondent's incompetence to stand trial on acts constituting a felony, the petitioner must show that the respondent "presents a substantial likelihood of repeating similar acts considering the charged criminal behavior, life history, progress in treatment, and the public safety." RCW 71.05.320(4). Because the Legislature did not state that this list of factors is exclusive, and because other factors might also bear on the respondent's likelihood of repeating similar acts, the WPI Committee has phrased the instruction so as to allow consideration of other relevant factors.

[Current as of December 2016.]

WPI 360.05.02

LESS RESTRICTIVE ALTERNATIVE—MENTAL ILLNESS—INVOLUNTARY TREATMENT

Less restrictive alternative treatment means an individualized program of court-ordered mental health treatment, under conditions to be imposed by the judge, in a setting other than detention. Less restrictive alternative treatment may include mental health treatment on an outpatient basis, medication, substance abuse counseling, residential treatment, housing, and other conditions to be imposed by the judge.

NOTE ON USE

This instruction may be used to assist jurors in understanding the general nature of less restrictive alternative treatment.

COMMENT

RCW 71.05.020(30), RCW 71.05.320(2), and RCW 71.05.585. This instruction was revised for the 2017–2018 Supplement to 6A Washington Practice, Washington Pattern Jury Instructions: Civil (6th ed.) to reflect the changes to the statutes.

Under RCW 71.05.320(2), the judge has three options when the jury's verdict is for less restrictive treatment. The judge must remand the respondent into the custody of the Department of Social and Health Services (DSHS), or into a facility that DSHS has certified for 90-day treatment, or to a less restrictive alternative. However, if the sole basis for commitment is "in need of assisted outpatient treatment," the court must enter an order for less restrictive alternative treatment and may not order inpatient treatment. See RCW 71.05.320(2). A court may order additional evaluation of the person if necessary to identify appropriate services. See RCW 71.05.320(3).

[Current as of December 2016.]

WPI 360.05.03

IN NEED OF ASSISTED OUTPATIENT TREATMENT—DEFINITION

In need of assisted outpatient mental health treatment means that a person, as a result of a mental disorder:

(a) [has been committed by a court to detention for involuntary mental health treatment at least twice during the preceding thirty-six months] [or]

[is currently committed for involuntary mental health treatment and has been committed to detention for involuntary mental health treatment at least once during the thirty-six months preceding the date of initial detention of the current commitment cycle];

(b) is unlikely to voluntarily participate in outpatient treatment without an order for less restrictive alternative treatment, in view of the person's [treatment history] [or] [current behavior];

(c) is unlikely to survive safely in the community without supervision;

(d) is likely to benefit from less restrictive alternative treatment; and

(e) requires less restrictive alternative treatment to prevent [a] [relapse][,] [decompensation][,] [or] [deterioration] that is likely to result in the person [presenting a likelihood of serious harm] [or] [becoming gravely disabled within a reasonably short period of time].

NOTE ON USE

Use with WPI 360.04 (Mental Illness—Involuntary Treatment—90 Days), WPI 360.05 (Mental Illness—Involuntary Treatment—180 Days),

WPIC 360.21 (Special Verdict Form—Mental Illness—Involuntary Treatment—90 Days), and WPIC 360.22 (Special Verdict Form—Mental Illness—Involuntary Treatment—180 Days).

Use paragraphs (a), (b), and (c) to the extent the elements are supported by the evidence and reletter/renumber as needed.

COMMENT

RCW 71.05.020(27); RCW 71.05.280; RCW 71.05.320. This instruction wasfirst published in the 2017–2018 Supplement to 6A Washington Practice, Washington Pattern Jury Instructions: Civil (6th ed.). In 2015, the Legislature added "in need of assisted outpatient treatment" as one of the grounds for involuntary treatment. RCW 71.05.280(5).

For purposes of (a) of this instruction, time spent in a mental health facility or in confinement as a result of a criminal conviction is excluded from the thirty-six month calculation. If there is an issue regarding calculation of the thirty-six month period, then the instruction will need to be modified.

[Current as of December 2016.]

WPI 360.06

BURDEN OF PROOF—MENTAL ILLNESS—INVOLUNTARY TREATMENT

(The state, or name of petitioner) **is the petitioner and has the burden of proving each element of [its] [his] [her] case by clear, cogent, and convincing evidence. Clear, cogent, and convincing evidence exists when the element has been shown by the evidence to be highly probable.**

Proof by clear, cogent, and convincing evidence requires a greater showing than is required under the "preponderance of the evidence" standard that is used in many other civil cases. Preponderance of the evidence exists when an element has been shown to be more probably true than not true.

On the other hand, proof by clear, cogent, and convincing evidence does not require as great a showing as is required under the "reasonable doubt" standard used in criminal cases. Reasonable doubt means such a doubt as exists in the mind of a reasonable person after fully, fairly, and carefully considering all the evidence or lack of evidence.

"Preponderance of the evidence" and "beyond a reasonable doubt" are defined here solely to aid you in understanding the meaning of "clear, cogent, and convincing" evidence.

The respondent does not have the burden to prove or disprove any element of the case.

NOTE ON USE

Use this instruction in every Involuntary Treatment Act case.

COMMENT

This instruction was revised for the 2017–2018 Supplement to 6A

Washington Practice, Washington Pattern Jury Instructions: Civil (6th ed.) for purposes of clarity to state that the respondent does not have the burden of proof on any element of the case. No substantive change was intended. The burden of proof mandated by the statute is clear, cogent, and convincing evidence. RCW 71.05.310. The jury must be instructed that clear, cogent, and convincing evidence is greater evidence than a preponderance. Addington v. Texas, 441 U.S. 418, 99 S.Ct. 1804, 60 L.Ed.2d 323 (1979).

The instruction incorporates a simplified version of the definition of "clear, cogent, and convincing evidence" suggested by the court in In re LaBelle, 107 Wn.2d 196, 728 P.2d 138 (1986). In *LaBelle*, the court stated that the phrase "clear, cogent, and convincing evidence" in involuntary commitment proceedings means "the ultimate fact in issue must be shown by evidence to be 'highly probable.' " In re LaBelle, 107 Wn.2d at 209, 728 P.2d 138. See also Morris v. Blaker, 118 Wn.2d 133, 821 P.2d 482 (1992). The WPI Committee has simplified this definition by omitting the phrase "the ultimate fact in issue," both because the phrase is not typically included in burden-of-proof definitions and because it would be difficult for jurors to understand. The WPI Committee has adjusted the definition of "preponderance of the evidence" so that it parallels the definition of "clear, cogent, and convincing evidence."

The instruction's format is similar to that of WPI 160.02 (Fraud—Burden of Proof), the civil instruction that defines the phrase clear, cogent, and convincing evidence for purposes of proving fraud. The definition of reasonable doubt comes from WPIC 4.01 (Burden of Proof—Presumption of Innocence—Reasonable Doubt) and the definition of preponderance of the evidence comes from WPI 21.01 (Meaning of Burden of Proof—Preponderance of the Evidence), the pattern instruction for civil cases.

In In re Detention of McLaughlin, 100 Wn.2d 832, 676 P.2d 444 (1984), the court upheld a prior version of WPI 360.06. The court rejected the respondent's argument that the instruction should state that the burden of proof was much closer to the standard of beyond a reasonable doubt than it was to the standard of a preponderance of the evidence. In the same case, however, the court held that the respondent is entitled to an instruction stating that the burden of proof is upon the petitioner to prove each element of its case by the requisite standard.

[Current as of December 2016.]

WPI 360.10

MENTAL DISORDER—DEFINITION MENTAL DISORDER MEANS ANY ORGANIC, MENTAL, OR EMOTIONAL IMPAIRMENT THAT HAS SUBSTANTIAL ADVERSE EFFECTS ON THE INDIVIDUAL'S COGNITIVE OR VOLITIONAL FUNCTIONS.

[Cognitive function refers to the mental processes by which a person becomes aware of, perceives, and comprehends ideas. It involves all aspects of perception, thinking, reasoning, and remembering.]

[Volitional function refers to the use of a person's own will in performing or abstaining from action.]

NOTE ON USE

Use the first paragraph in every case. The bracketed paragraphs may be used to assist jurors in understanding the terms used in the first paragraph.

COMMENT

The instruction's first paragraph uses wording from RCW 71.05.020(29).

The bracketed paragraphs use language derived from Mosby's Medical, Nursing & Allied Health Dictionary, pp. 361 and 1719 (5th ed.). These bracketed paragraphs may be used to assist jurors in understanding the concepts involved in the underlying definition of "mental disorder."

A developmentally disabled person may be found to have a "mental disorder" supporting involuntary commitment if the developmental disability substantially affects that person's cognitive or volitional functions. In re Detention of R.S., 124 Wn.2d 766, 881 P.2d 972 (1994).

[Current as of December 2016.]

WPI 360.11

CUSTODY—MENTAL ILLNESS—DEFINITION

Custody means involuntary detention under the state's mental health laws [uninterrupted by any period of unconditional release from commitment from a facility providing involuntary care and treatment].

NOTE ON USE

Use bracketed material as applicable. In some cases, the jurors will need additional instruction using more specific language from RCW Chapter 71.05 or Chapter 10.77, as applicable, addressing when a respondent is in custody.

COMMENT

RCW 71.05.020.

This instruction is taken directly from the statutory definition. This instruction was revised for the 2017–2018 Supplement to 6A Washington Practice, Washington Pattern Jury Instructions: Civil (6th ed.) in order to more closely track the statutory language.

[Current as of December 2016.]

WPI 360.12

GRAVELY DISABLED—MENTAL ILLNESS—DEFINITION

Gravely disabled means a condition in which a person, as a result of a mental disorder:

(1) is in danger of serious physical harm resulting from a failure to provide for his or her essential human needs of health or safety, or

(2) manifests severe deterioration in routine functioning evidenced by repeated and escalating loss of cognitive or volitional control over his or her actions and is not receiving or would not receive, if released, such care as is essential for his or her health or safety.

NOTE ON USE

Use this definition in every case involving grave disability.

COMMENT

RCW 71.05.020.

The Washington Supreme Court upheld prior (but substantially similar) versions of RCW 71.05.020 against challenges that the statutes were unconstitutionally vague or overbroad. In re LaBelle, 107 Wn.2d 196, 728 P.2d 138 (1986). The court in *LaBelle* construed RCW 71.05.020 to require a showing of a substantial risk of danger of serious harm resulting from the failure to provide for essential health and safety needs. In making this showing, the State "must present recent, tangible evidence of failure or inability to provide for such essential human needs as food, clothing, shelter, and medical treatment that presents a high probability of serious physical harm within the near future unless adequate treatment is afforded." In re LaBelle, 107 Wn.2d at 204–05; see Morris v. Blaker, 118 Wn.2d 133, 138, 821 P.2d 482 (1992) (quoting *LaBelle*). Furthermore, the failure or inability to provide for these essential needs must be shown to arise as a result of mental disorder and not because of other factors. In re LaBelle, 107 Wn.2d at 204–05.

When the State is proceeding under the gravely disabled standard defined in RCW 71.05.020, the evidence must provide a factual basis for

concluding that an individual manifests severe mental deterioration in routine functioning. This evidence must include recent proof of significant loss of cognitive or volitional control. In addition, the evidence must reveal a factual basis for concluding that the individual is not receiving or would not receive, if released, such care as is essential for his or her health or safety. It is not enough to show that care and treatment of an individual's mental illness would be preferred or beneficial or even in his or her best interests. To justify commitment, such care must be shown to be essential to an individual's health or safety and the evidence should indicate the harmful consequences likely to follow if involuntary treatment is not ordered. Moreover, the person with the mental disorder must be unable, because of severe deterioration of mental functioning, to make a rational decision with respect to his or her need for treatment. In re LaBelle, 107 Wn.2d 196, 208, 728 P.2d 138 (1986).

Depending on the facts of the particular case, it may be advisable to supplement the instruction with language from *LaBelle* or *R.A.W.* in order to more fully explain the meaning of the statutory language. See LaBelle, 107 Wn.2d 196, 204–08, 728 P.2d 138 (1986) (construing the statutory definition of "gravely disabled" so that the statute is neither vague nor overbroad); In re R.A.W., 104 Wn.App. 215, 224–25, 15 P.3d 705 (2001) (approving the trial court's instruction, which was taken directly from this pattern instruction, but also setting forth an analysis that provides greater specificity as to the statutory requirements).

[Current as of December 2016.]

WPI 360.13

LIKELIHOOD OF SERIOUS HARM—MENTAL ILLNESS—DEFINITION

Likelihood of serious harm means [either]:

[a substantial risk that physical harm will be inflicted by an individual upon his or her own person, as evidenced by recent threats or attempts to commit suicide or inflict physical harm on oneself] [or]

[a substantial risk that physical harm will be inflicted by an individual upon another, as evidenced by a recent overt act that caused such harm or which places another person or persons in reasonable fear of sustaining such harm] [or]

[a substantial risk that physical harm will be inflicted by an individual upon property of others, as evidenced by a recent overt act that caused substantial loss or damage to the property of others] [or]

[the individual has threatened the physical safety of another and has a history of one or more violent acts].

NOTE ON USE

Use bracketed material as applicable.

Do not use the first bracketed paragraph relating to serious harm to oneself in 180-day treatment instructions.

COMMENT

RCW 71.05.020.

Under RCW 71.05.320(2)(a) through (d), relating to 180-day treatment cases, harm to oneself is not included as an element.

The WPI Committee has substituted the words "a recent overt act" for the word "behavior" in the second and third paragraphs of this instruction based on In re Harris, 98 Wn.2d 276, 654 P.2d 109 (1982).

In *Harris*, the court interpreted RCW 71.05.020(3) "as requiring a showing of a substantial risk of physical harm as evidenced by a recent overt act." In re Harris, 98 Wn.2d at 284. See also A.S. v. State, 91 Wn.App. 146, 955 P.2d 836 (1998), reversed on other grounds 138 Wn.2d 898, 982 P.2d 1156 (1999) (affirming that substantial risk must be shown by a recent overt act).

Despite this holding from *Harris*, two Court of Appeals cases have held that how "recent" the act must be may depend upon the patient's opportunity to reoffend. In re Detention of P.S., 75 Wn.App. 571, 879 P.2d 294 (1994); In re Detention of Pugh, 68 Wn.App. 687, 845 P.2d 1034 (1993). In *Pugh*, a Division II case, the court found that the absence of overt acts more recent than five years before the hearing was:

> readily explainable as a lack of opportunity to offend rather than a demonstration of improvement so as to negate the showing that he presents a substantial risk of physical harm. We are satisfied that his earlier offenses resulting in convictions when considered with his confinement and current diagnosis satisfy the requirement that his future dangerousness be evidenced by a recent overt act.

In re Detention of Pugh, 68 Wn.App. at 696, 845 P.2d 1034. Division I followed the *Pugh* rationale in *P.S.*, finding a 1989 rape charge sufficient evidence of a recent overt act to support a 1992 finding in favor of continued commitment, when combined with evidence of other behavior and expert testimony supporting a great likelihood of reoffense. In re Detention of P.S., 75 Wn.App. 571, 574–77, 879 P.2d 294 (1994).

[Current as of December 2016.]

WPI 360.13.01

OVERT ACT—RECENT—HISTORY OF VIOLENT ACTS—VIOLENT ACT—DEFINITIONS

[An "overt act" is an act that causes harm or creates a reasonable apprehension of dangerousness.]

[In determining whether an "overt act" is "recent," you may consider the extent to which the individual has had an opportunity to commit such acts or engage in similar behavior. You may also consider the time span in the context of all the surrounding relevant circumstances.]

["History of one or more violent acts" refers to the period of time ten years prior to the filing of a petition under this chapter, excluding any time spent, but not any violent acts committed, in a mental health facility or in confinement as a result of a criminal conviction.]

["Violent act" means behavior that resulted in homicide, attempted suicide, nonfatal injuries, or substantial damage to property.]

NOTE ON USE

Use this instruction to define the terms contained in WPI 360.13 (Likelihood of Serious Harm—Mental Illness—Definition). Choose from among the above definitions depending on the terms that are used in WPI 360.13.

COMMENT

The definition of "overt act" is taken from In re Harris, 98 Wn.2d 276, 284–85, 654 P.2d 109 (1982).

The definition of "recent" for purposes of an overt act is taken from In re Pugh, 68 Wn.App. 687, 695–96, 845 P.2d 1034 (1993). In order to cover all the applicable circumstances, the WPI Committee has replaced *Pugh's* term "opportunity to re-offend" with "opportunity to commit such acts or engage in similar behavior."

The definitions of "history of one or more violent acts" and "violent act" are taken from RCW 71.05.020(19) and (48). A separate but related

statute, RCW 71.05.245, states that the court, when determining the issue of likelihood of serious harm, must give great weight to any recent history of one or more violent acts, which the statute then defines as a period of three years. Courts should use caution in instructing jurors as to giving great weight under RCW 71.05.245, because similar language in RCW 71.05.012's statement of legislative intent has been held to constitute an impermissible comment on the evidence. See In re R.W., 98 Wn.App. 140, 144–46, 988 P.2d 1034 (1999) (noting, however, that instructing jurors as to an accurate statement of law, as opposed to a legislative statement of intent, does not constitute a comment on the evidence).

[Current as of December 2016.]

WPI 360.14

MENTAL ILLNESS—RESPONDENT'S FAILURE TO TESTIFY

In an involuntary treatment proceeding, the respondent has a right to remain silent from the time of [his] [her] detention. A respondent may not be compelled to testify. The fact that (name of respondent) **has exercised [his] [her] right to remain silent cannot be used to infer a mental disorder and should not prejudice [him] [her] in any way.**

NOTE ON USE

Use this instruction if requested. See Comment.

COMMENT

Upon request, the respondent has a right to an instruction such as WPI 360.14. In re Detention of McLaughlin, 100 Wn.2d 832, 676 P.2d 444 (1984) (addressing the former version of this instruction, WPIC 200.14).

A person detained for involuntary mental illness treatment has the right to remain silent from the time of the initial detention and is not required to testify in court proceedings. See RCW 71.05.217, 71.05.300, 71.05.310, and 71.05.360. The former version of this instruction, WPIC 200.14, addressed only the testimonial aspect of this right. See 11A Washington Practice, Washington Pattern Jury Instructions: Criminal (2nd ed.). The WPI Committee expanded the instruction for the 2004 edition in order to reflect the full scope of the respondent's right to remain silent. In some cases the instruction should address the issue of silence during detention in greater detail, inasmuch as the respondent's silence during detention might under some circumstances be properly considered by the jury. For example, although jurors could not consider silence during detention when the respondent deliberately chooses to remain silent, the same might not be true if an expert witness testifies that the respondent remains mute due to severe depression.

[Current as of December 2016.]

WPI 360.15

MENTAL ILLNESS—EXPERT TESTIMONY—LIMITATION ON CONSIDERATION OF EVIDENCE

A witness who has special training, education, or experience may be allowed to express an opinion in addition to giving testimony as to facts. You are not, however, required to accept his or her opinion. To determine the credibility and weight to be given to this type of evidence, you may consider, among other things, the education, training, experience, knowledge, and ability of the witness. You may also consider the reasons given for the opinion and the sources of his or her information, as well as considering the factors already given to you for evaluating the testimony of any other witness.

[An expert witness may have testified to information outside of the witness's personal knowledge when that information has been relied upon in forming his or her opinion. If previously limited by the court, you must not consider this type of testimony as proof that such outside information is true but only for the purpose of assessing what credibility or weight should be given the expert witness's opinion testimony.]

NOTE ON USE

Use this written instruction if requested.

For the oral instruction to be given at the time the evidence is admitted, see WPI 6.07 (Limited Purpose Evidence—Generally).

Use the bracketed second paragraph as appropriate in order to instruct jurors as to the issues involved when experts testify based on information outside their personal knowledge. The paragraph may be modified as necessary to more specifically identify the particular testimony to which the paragraph applies. The paragraph will not be necessary if the parties did not object to any testimony beyond the expert's personal knowledge or otherwise waived the right to a limiting instruction.

COMMENT

The instruction's first paragraph is taken from WPI 2.10 (Expert Testimony).

For additional discussion, see the Comments to WPI 1.06 (Evidence for Limited Purpose) and WPI 2.10 (Expert Testimony).

[Current as of December 2016.]

WPI 360.20

CONCLUDING INSTRUCTION—MENTAL ILLNESS—INVOLUNTARY TREATMENT

Upon retiring to the jury room for your deliberations, first select a presiding juror. The presiding juror shall see that your discussion is sensible and orderly, that you fully and fairly discuss the issues submitted to you, and that each of you has an opportunity to be heard and to participate in the deliberations on each question before the jury. Deliberations are to occur only in the jury room when all [twelve] jurors are present.

You are all officers of the court and must evaluate the evidence with an open mind free of bias or prejudice. If during your deliberations, you become concerned that the discussions are being influenced by preconceived bias or prejudice, you must bring this to the attention of the other jurors so that the issue may be fairly discussed among all members of the jury.

You will be given [the exhibits admitted in evidence and] these instructions.

[You will also be given a special verdict form that consists of several questions for you to answer. You must answer the questions in the order in which they are written, and according to the directions on the form. It is important that you read all the questions before you begin answering, and that you follow the directions exactly. Your answer to some questions will determine whether you are to answer all, some, or none of the remaining questions.]

[You will be provided with two special verdict forms, A and B. On verdict form A you must answer the questions in the order in which they are written, and according to the directions on the form. It is important that you read all the questions before answering, and that you follow the directions exactly. Your answer to some questions will

determine whether you are to answer all, some, or none of the remaining questions. If the answer to question 1 on verdict form A is "no," then do not answer any further questions. Use verdict form B only if your answer on verdict form A, question 1, is "yes" and the remaining answers are "no." If any of questions 2 through 6 on verdict form A are answered "yes," then do not use verdict form B.]

During your deliberations, you may discuss any notes that you have taken during the trial, if you wish. You have been allowed to take notes to assist you in remembering clearly, not to substitute for your memory or the memories or notes of other jurors. However, do not assume that your notes are more or less accurate than your memory.

You will need to rely on your notes and memory as to the testimony presented in this case. Testimony will rarely, if ever, be repeated for you during your deliberations.

If you need to ask the court a question that you have been unable to answer among yourselves after reviewing the evidence and instructions, write the question simply and clearly. The presiding juror should sign and date the question and give it to the bailiff. The court will confer with counsel to determine what answer, if any, can be given.

In your question to the court, do not indicate how your deliberations are proceeding. Do not state how the jurors have voted on any particular question or issue. Do not in any other way express your opinions about the case.

In order to answer any question on the verdict form, [ten] [five] jurors must agree upon the answer. It is not necessary that the jurors who agree on the answer be the same jurors who agreed on the answer to any other question, so long as [ten] [five] jurors agree to each answer.

When you have finished answering the questions ac-

cording to the directions on the verdict form, the presiding juror must sign the form, whether or not the presiding juror agrees with the verdict. The presiding juror will then tell the bailiff that the jury has reached a verdict, and the bailiff will bring you back into court where your verdict will be announced.

NOTE ON USE

Use WPI 360.21 (Special Verdict Form [A] (90 Days)—Mental Illness—Involuntary Treatment—90 Days), and WPI 360.22 (Special Verdict Form [A] (180 Days)—Mental Illness—Involuntary Treatment—180 Days), with this instruction.

Use the third bracketed paragraph in one of two situations:

(1) If the petitioner is not alleging that respondent is "in need of assisted outpatient treatment" and neither party wants the jury to consider this as an alternative, then only give verdict form A in WPI 360.21 or WPI 360.22 to the jury.

(2) If the petitioner alleges only that respondent is "in need of assisted outpatient treatment" and no other grounds, then only give verdict form B in WPI 360.23 (Special Verdict Form [B]—Mental Illness—Involuntary Treatment—In Need of Assisted Outpatient Treatment) to the jury.

Use the fourth bracketed paragraph if the petitioner alleges that the respondent is "in need of assisted outpatient treatment" and also alleges other grounds as the basis of detention, or either party wants the jury to consider this alternative. In this instance, verdict forms A and B would be given to the jury, and the jury would use them pursuant to this instruction.

The third and fourth paragraphs should not be used together.

Use bracketed material as applicable.

COMMENT

This instruction has been revised for this edition. New to this edition is the second paragraph of the instruction, which encourages all members of the jury to be responsible for ensuring that decisions are made based solely on the evidence and not upon preconceived biases or prejudices. The United State Supreme Court in Peña-Rodriguez v. Colorado, __ U.S. __, 137 S. Ct 855, 869, 197 L.Ed.2d 107 (2017),

concluded that the general rule against impeaching a jury verdict must fall when a juror has indicated that he or she relied on racial animus or stereotypes in reaching the verdict. In Turner v. Stime, 153 Wn.App. 581, 222 P.3d 1243 (2009), the court concluded that statements of clear racial bias made by a juror concerning plaintiff's counsel do not "inhere in the verdict" and that it was proper for the trial court to grant a new trial upon proof that such statements were made.

For a discussion of other issues involving both conscious and unconscious bias, see the Comment to WPI 1.01 (Advance Oral Instruction—Beginning of Proceedings).

In In re Detention of McLaughlin, 100 Wn.2d 832, 676 P.2d 444 (1984), the court upheld an instruction allowing a verdict upon agreement by ten jurors. The court rejected the respondent's argument that involuntary commitment requires a unanimous verdict.

Special verdict forms are used in mental illness commitment cases. MPR 3.4(c). RCW 4.44.380 provides that a verdict reached by ten of the jurors becomes the verdict of the entire jury. In previous editions, this instruction included alternative language depending on whether the "same ten jurors" standard (under which the same ten jurors must agree on every question on the verdict form) or the "any ten jurors" standard (under which it is sufficient for any group of ten jurors to agree on each question) is used. These alternatives were necessary in previous editions because of a long-standing ambiguity in Washington's case law as to which of these standards applies. The Supreme Court settled this issue in 2001 when it amended CR 49(k) to adopt the "any ten jurors" standard. The instruction now reflects the "any ten jurors" standard.

[Current as of March 2018.]

WPI 360.21

SPECIAL VERDICT FORM [A] (90 DAYS)—MENTAL ILLNESS—INVOLUNTARY TREATMENT

(Insert case caption.)

We, the jury, answer the questions submitted by the court as follows:

QUESTION 1: Does the respondent, (fill in name), **have a mental disorder?**

ANSWER: _____ (Write "yes" or "no")

(DIRECTION: If your answer to Question 1 is "no," do not answer any further questions. If your answer to Question 1 is "yes," you must then answer questions [2], [3], [4] [and] [5], as instructed below.)

[QUESTION 2: Is (name of respondent) **gravely disabled as a result of [his] [her] mental disorder?**

ANSWER: _____ (Write "yes" or "no")]

[QUESTION 3a: Has (name of respondent), **after having been taken into custody for evaluation and treatment, threatened, attempted or inflicted [physical harm upon] [the person of another] [or] [himself] [herself], [or] [substantial damage upon the property of another]?**

ANSWER: _____ (Write "yes" or "no")

(DIRECTION: If your answer to Question 3a is no, do not answer Question 3b. If your answer to Question 3a is yes, you must now answer Question 3b.)

QUESTION 3b: Does (name of respondent), **as a result of [his] [her] mental disorder, present a likelihood of serious harm to [himself] [herself] [others] [or] [the property of others]?**

ANSWER: _____ (Write "yes" or "no")]

[QUESTION 4a: Was (name of respondent) **taken into custody as a result of conduct in which [he] [she] attempted or inflicted [physical harm upon the person of another] [or] [himself] [herself] [or] [substantial damage upon the property of others]?**

ANSWER: _____ (Write "yes" or "no")

(DIRECTION: If your answer to Question 4a is no, do not answer Question 4b. If your answer to Question 4a is yes, you must now answer Question 4b.)

QUESTION 4b: Does (name of respondent), **as a result of [his] [her] mental disorder, continue to present a likelihood of serious harm to [himself] [herself], [others] [or] [the property of others]?**

ANSWER: _____ (Write "yes" or "no")]

[QUESTION 5a: Have criminal charges against (name of respondent) **been dismissed due to a finding of incompetence and has respondent been determined to be incompetent and did [he] [she] commit acts constituting a felony, specifically:** (specify the felony or felonies)**?**

ANSWER: _____ (Write "yes" or "no")

(DIRECTION: If your answer to Question 5a is no, do not answer Question 5b. If your answer to Question 5a is yes, you must now answer Question 5b.)

QUESTION 5b: Does (name of respondent), **as a result of [his] [her] mental disorder, present a substantial likelihood of repeating similar acts?**

ANSWER: _____ (Write "yes" or "no")]

(DIRECTION: If your answers to question[s] [2], [3b], [4b], [5b] all are "no," do not answer any further questions. If your

answer to any one or more of those questions is "yes," then you must proceed to answer the following question.)

QUESTION [6]: Has the petitioner proved that the best interest of (fill in name) **or others will not be served by less restrictive treatment that is an alternative to detention?**

ANSWER:_____ (Write "yes" or "no")

(DIRECTION: Sign this verdict form and notify the bailiff.)

DATE: _____ _____

Presiding Juror

NOTE ON USE

Use this instruction for 90-day involuntary commitment proceedings. Under one set of circumstances, the instruction may also apply to a 180-day involuntary treatment case. See the discussion in the Comment. For other 180-day involuntary commitment proceedings, use WPI 360.22 (Special Verdict Form [A] (180 Days)—Mental Illness—Involuntary Treatment).

Use bracketed material as applicable. Select from among Questions 2, 3, 4, and 5 depending on the statutory grounds at issue and renumber the questions accordingly. In this regard, also make the appropriate selections from the bracketed alternatives in the directions to the jurors that follow Questions 1 and 5 above.

Do not separate Question 3a from 3b, 4a from 4b, or 5a from 5b. In each instance, the (a) and (b) sections together address one of the statutory grounds for commitment and should be considered as a single unit. For example, Questions 3a and 3b will both apply to a particular case or neither will. The (a) and (b) units are drafted separately in order to convert lengthy statutory passages into questions that will be easier for jurors to understand.

If Question 5a is being used, the jury instructions should include a separate instruction setting forth the elements of the felony or felonies, absent any element of intent, willfulness or state of mind. See the Comment to WPI 360.04 (Mental Illness—Involuntary Treatment—90 Days).

Use WPI 360.20 (Concluding Instruction—Mental Illness—Involuntary Treatment) with this verdict form.

COMMENT

RCW 71.05.280; RCW 10.77.086.

This instruction applies to 90-day involuntary commitment proceedings. The instruction may also be used for one particular subset of 180-day hearings. In proceedings for commitment under RCW 71.05.320(1), when the grounds specified for commitment are those contained in RCW 71.05.280(3) (acts constituting a felony), an election may be made to pursue commitment of up to 90 days or up to 180 days. Under either election, the jury would be instructed using the above instruction rather than WPI 360.22 (Special Verdict Form [A] (180 Days)—Mental Illness—Involuntary Treatment).

With regard to civil commitment of incompetent criminal defendants, see Jackson v. Indiana, 406 U.S. 715, 92 S.Ct. 1845, 32 L.Ed.2d 435 (1972).

See the discussion of Foucha v. Louisiana, 504 U.S. 71, 112 S.Ct. 1780, 118 L.Ed.2d 437 (1992), in the Comments to WPI 360.04 (Mental Illness—Involuntary Treatment—90 Days) or WPI 360.05 (Mental Illness—Involuntary Treatment—180 Days). For a general discussion of the issues involved in drafting this instruction, see the Comment to WPI 360.04.

Under RCW 71.05.290(3), a petition brought under RCW 71.05.280(3) (acts constituting a felony) may seek commitment for a period of up to 180 days even though no previous petitions were filed for initial detention or for a 14-day detention. This statute speaks only of RCW 71.05.280(3); it does not refer to the other subsections of RCW 71.05.280. In this regard, RCW 71.05.290(3) differs from the broader language contained in the counterpart statute for acts constituting a misdemeanor, RCW 71.05.235(2). Accordingly, if a 180-day petition is brought as authorized in 71.05.290(3), and if the petition alleges not only acts constituting a felony under RCW 71.05.280(3) but also alleges one or more of the other grounds for commitment under RCW 71.05.280, then the verdict form will need to be modified so that commitment can take place only if the grounds under RCW 71.05.280(3) are found to be true.

[Current as of December 2016.]

WPI 360.22

SPECIAL VERDICT FORM [A] (180 DAYS)—MENTAL ILLNESS—INVOLUNTARY TREATMENT

(Insert case caption.)

We, the jury, answer the questions submitted by the court as follows:

QUESTION 1: Does the respondent, (name of respondent), **have a mental disorder?**

ANSWER: _____ (Write "yes" or "no")

(DIRECTION: If your answer to Question 1 is "no," do not answer any further questions. If your answer to Question 1 is "yes," you must then answer questions [2], [3], [4] [and] [5], as instructed below.)

[QUESTION 2: Is (name of respondent) **gravely disabled as a result of a mental disorder?**

ANSWER: _____ (Write "yes" or "no")]

[QUESTION 3a: Has (name of respondent), **during the current period of court ordered treatment, threatened, attempted or inflicted [physical harm upon the person of another] [or] [substantial damage upon the property of another]?**

ANSWER: _____ (Write "yes" or "no")

(DIRECTION: If your answer to Question 3a is no, do not answer Question 3b. If your answer to Question 3a is yes, you must now answer Question 3b.)

QUESTION 3b: Does (name of respondent), **as a result of [his] [her] mental disorder, present a likelihood of serious harm to [others], [or] [the property of others]?**

ANSWER: _____ (Write "yes" or "no")]

[QUESTION 4: Does (name of respondent), **as a result of [his] [her] mental disorder, continue to present a likelihood of serious harm to others?**

ANSWER: _____ (Write "yes" or "no")]

[QUESTION 5: Does (name of respondent), **as a result of [his] [her] mental disorder, present a substantial likelihood of repeating acts similar to** (specify felony or felonies found in previous ITA court proceedings)**?**

ANSWER: _____ (Write "yes" or "no")]

(DIRECTION: If your answers to question[s] [2], [3b], [4], [5] all are "no," do not answer any further questions. If your answer to any one or more of those questions is "yes," then you must proceed to answer the following question.)

QUESTION 6: Has the petitioner proved that the best interest of (fill in name) **or others will not be served by less restrictive treatment that is an alternative to detention?**

ANSWER: _____ (Write "yes" or "no")

(DIRECTION: Sign this verdict form and notify the bailiff.)

DATE: _____ _____

Presiding Juror

NOTE ON USE

Use this instruction for 180-day involuntary commitment proceedings. For 90-day involuntary commitment proceedings, use WPI 360.21 (Special Verdict Form [A] (90 Days)—Mental Illness—Involuntary Treatment).

The instruction is drafted under the assumption that certain elements have already been proved in a prior commitment proceeding. For the rare case in which these elements have not already been proved, the instruction will need to be modified. See the Comment below.

Use bracketed material as applicable. Select from among Questions

2, 3, 4, and 5 depending on the statutory grounds at issue and renumber the questions accordingly. In this regard, also make the appropriate selections from the bracketed alternatives in the directions to the jurors that follow Questions 1 and 5 above.

Do not separate Question 3a from 3b. The (a) and (b) sections together address one of the statutory grounds for commitment and should be considered as a single unit. Either Questions 3a and 3b will both apply to a particular case or neither will. The (a) and (b) units are drafted separately in order to convert lengthy statutory passages into questions that will be easier for jurors to understand.

If Question 5 is being used, the jury instructions should include a separate instruction setting forth the elements of the felony or felonies, absent any element of intent, willfulness or state of mind. See the Comment to WPI 360.05 (Mental Illness—Involuntary Treatment—180 Days).

Use WPI 360.20 (Concluding Instruction—Mental Illness—Involuntary Treatment) with this verdict form.

COMMENT

RCW 71.05.320; RCW 10.77.086.

This verdict form is for use at a 180-day involuntary commitment hearing, which will have been preceded by an earlier involuntary treatment hearing. At the 180-day hearing, the petitioner need not reprove certain elements when those elements were proved in the earlier hearing. See RCW 71.05.320(2) (the elements are those set forth in RCW 71.05.320(2)(b) and (2)(c)). The instruction above is drafted under the assumption that these elements will not need to be reproved. Practitioners should carefully review the earlier proceedings to make sure that these elements in fact have already been proved. In the rare case when these elements have not already been proved, the instruction above will need to be modified, perhaps by incorporating some of the elements from the 90-day verdict form, to address the elements more fully.

With regard to civil commitment of incompetent criminal defendants, see Jackson v. Indiana, 406 U.S. 715, 92 S.Ct. 1845, 32 L.Ed.2d 435 (1972).

See the discussion of Foucha v. Louisiana, 504 U.S. 71, 112 S.Ct. 1780, 118 L.Ed.2d 437 (1992), in the Comments to WPI 360.04 (Mental Illness—Involuntary Treatment—90 Days) or WPI 360.05 (Mental Illness—Involuntary Treatment—180 Days). For a general discussion of the issues involved in drafting this instruction, see the Comment to WPI 360.05 (Mental Illness—Involuntary Treatment—180 Days).

[Current as of December 2016.]

WPI 360.23

SPECIAL VERDICT FORM [B]—MENTAL ILLNESS—INVOLUNTARY TREATMENT—IN NEED OF ASSISTED OUTPATIENT TREATMENT

(Insert case caption.)

We, the jury, answer the questions submitted by the court as follows:

[Preliminary Question: Does the respondent, (name of respondent), **have a mental disorder?**

ANSWER: _____ (Write "yes" or "no")]

(DIRECTION: If your answer to the preliminary question is "no," do not answer any further questions. Sign this verdict form and notify the bailiff. If your answer to the Preliminary Question is "yes," then you must answer questions [1], [2], [3], [4] [and] [5], as instructed below.)

[QUESTION 1: As a result of a mental disorder [has the respondent, (name of respondent), **been committed by a court to detention for involuntary mental health treatment at least twice during the preceding thirty-six months?] [or] [is the respondent,** (name of respondent), **currently committed for involuntary mental health treatment and has respondent been committed for involuntary treatment at least once during the thirty-six months preceding the date of the initial detention of the current commitment cycle?]**

ANSWER: _____ (Write "yes" or "no")]

QUESTION 2: As a result of a mental disorder, is (name of respondent) **unlikely to voluntarily participate in outpatient treatment without an order for less restrictive treatment, in view of [his] [her] [treatment history] [or] [current behavior]?**

ANSWER: _____ (Write "yes" or "no")

QUESTION 3: As a result of a mental disorder, is (name of respondent) **unlikely to survive safely in the community without supervision?**

ANSWER: _____ (Write "yes" or "no")

QUESTION 4: As a result of a mental disorder, is (name of respondent) **likely to benefit from less restrictive alternative treatment?**

ANSWER: _____ (Write "yes" or "no")

QUESTION 5: As a result of a mental disorder, does (name of respondent) **require less restrictive treatment to prevent a relapse, decompensation, or deterioration that is likely to result in the person [presenting a likelihood of serious harm] [or] [becoming gravely disabled within a reasonably short period of time].**

ANSWER: _____ (Write "yes" or "no")

(DIRECTION: Sign this form and notify the bailiff.)

DATE: _____ _____

Presiding Juror

NOTE ON USE

Use this verdict form if "is in need of assisted outpatient treatment" is the only alleged ground for commitment, or Verdict Form A has been used and the answer on Verdict Form A to question 1 is "yes" and the remaining answers are "no."

The preliminary question is only necessary if "in need of assisted outpatient treatment" is the only grounds on which a petition has been filed. It is not necessary if verdict form A has been used.

Use bracketed material as applicable. Use WPI 360.20 (Concluding Instruction—Mental Illness—Involuntary Treatment) with this verdict form.

COMMENT

RCW 71.05.020, RCW 71.05.280, and RCW 71.05.320. This special verdict form was first published in the 2017–2018 Supplement to 6A Washington Practice, Washington Pattern Jury Instructions: Civil (6th ed.). In 2015, the Legislature amended the Involuntary Treatment Act to provide that a person may be committed for involuntary mental health treatment if he or she, due to a mental disorder, is in need of assisted outpatient mental health treatment. RCW 71.05.280(5).

[Current as of December 2016.]

CHAPTER 365

INVOLUNTARY TREATMENT—SEXUALLY VIOLENT PREDATORS

WPI 365.00	Introduction
WPI 365.01	Sexually Violent Predators—Initial Commitment Advance Oral Instruction—Voir Dire
WPI 365.02	Sexually Violent Predators—Conclusion of Trial—Introductory Instruction
WPI 365.03	Basis of Expert Opinion—Limiting Instruction
WPI 365.04	Opinion Testimony—Limitation on Consideration of Evidence
WPI 365.10	Sexually Violent Predators—Elements for Commitment
WPI 365.11	Sexually Violent Predators—Reasonable Doubt—Definition
WPI 365.12	Sexually Violent Predators—Mental Abnormality—Definition
WPI 365.12.01	Personality Disorder—Definition
WPI 365.13	Sexually Violent Predators—Predatory—Definition
WPI 365.14	Sexually Violent Predators—Likely to Engage—Definition
WPI 365.15	Sexually Violent Predators—Recent Overt Act—Definition
WPI 365.16	Sexually Violent Predators—Sexual Violence—Definition
WPI 365.20	Sexually Violent Predators—Concluding Instruction
WPI 365.21	Sexually Violent Predators—Initial Commitment—Verdict Form
WPI 365.30	Sexually Violent Predators—Conditional Release (LRA)—Unconditional Discharge—Advance Oral Instruction—Voir Dire
WPI 365.31	Sexually Violent Predators—Conditional Release / Less Restrictive Alternative Placement (LRA)—Elements
WPI 365.32	Sexually Violent Predators—Conditional Release / Less Restrictive Alternative Placement (LRA)—Definition of "Less Restrictive Alternative"
WPI 365.33	Sexually Violent Predators—Reasonable Doubt—Less Restrictive Alternative Trial (LRA) / Conditional Release
WPI 365.34	Sexually Violent Predators—Unconditional Discharge Trial—Elements

WPI 365.35 Sexually Violent Predators—Reasonable Doubt—Unconditional Discharge Trial—Definition
WPI 365.36 Sexually Violent Predators—Verdict Form—Unconditional Discharge
WPI 365.37 Sexually Violent Predators—Verdict Form—Conditional Release—LRA

WPI 365.00

INTRODUCTION

The core provisions of the Sexually Violent Predator Act (SVPA), RCW Chapter 71.09, have been found to be constitutional. In re Young, 122 Wn.2d 1, 857 P.2d 989 (1993); Seling v. Young, 531 U.S. 250, 121 S.Ct. 727, 148 L.Ed.2d 734 (2001).

Although SVPA proceedings are civil in nature, the State must meet its burden of proving the status of the respondent as a sexually violent predator beyond a reasonable doubt. RCW 71.09.060. Both parties have a right to a 12-person jury, and jury unanimity is required. RCW 71.09.050; RCW 71.09.060; In re Young, 122 Wn.2d at 48.

Because jury unanimity is required, alternative means and/or unanimity instructions may be helpful to the jury in certain cases. See generally In re Detention of Halgren, 156 Wn.2d 795, 807–12, 132 P.3d 714 (2006). The Washington Supreme Court and the Court of Appeals have interpreted the SVPA provisions about personality disorder and mental abnormality as sometimes being different and completely separate grounds, but other times being connected and inseparable. See In re Halgren, 156 Wn.2d at 810–12; In re Detention of Sease, 149 Wn.App. 66, 75–79, 201 P.3d 1078 (2009); In re Detention of Pouncy, 144 Wn.App. 609, 618–20, 184 P.3d 651 (2008), affirmed,168 Wn.2d 382, 229 P.3d 678 (2010). Of course, if there is no evidence proferred as to one of these two alternatives (personality disorder or mental abnormality), the jury must not be instructed as to that alternative. In re Halgren, 156 Wn. 2d at 811; In re Detention of Sease, 149 Wn.App. at 75–79.

The WPI Committee does not propose a specialized SVP alternative means or unanimity instruction. *Halgren* used the approach of State v. Arndt, 87 Wn.2d 374, 553 P.2d 1328 (1976). However, if the court decides to give such an instruction, the instructions, Notes on Use, and Comments in WPIC 4.20 (Introduction), WPIC 4.23 (Element of the Crime—Alternative Elements—Alternative Means for Committing a Single Offense—Form), and WPIC 190.09 (Special Verdict Form—Elements with Alternatives) can serve as a model.

The WPI Committee also recognizes the possibility that alternative means and unanimity instructions may be considered in a trial for

conditional release (less restrictive alternative (LRA)) or unconditional discharge; in that event the cases and WPI sections cited above should be consulted for guidance. For further discussion, see the Comments to WPI 365.31 (Sexually Violent Predators—Conditional Release/Less Restrictive Alternative Placement (LRA)—Elements) and 365.37 (Sexually Violent Predators—Verdict Form—Conditional Release—LRA).

Although certain protections consistent with criminal procedures do apply, Washington does not consider a civil commitment proceeding to be quasi-criminal; they are "resolutely civil in nature." In re Detention of Reyes, 184 Wn.2d 340, 358 P.3d 394 (2015) (doctrine of structural error does not apply). Caution must be used in applying criminal jurisprudence when analyzing issues in a sexually violator predator proceeding.

The SVPA has been challenged in court numerous times, with major amendments enacted in 1995, 2001, 2005, and 2009 in response to developing case law. As a result, care must be taken to ensure that the case law relied upon is actually interpreting the current version of the statute. In addition, because a number of other states have similar SVP provisions, Washington courts have looked to federal and state opinions interpreting these other statutes to assist in interpreting Washington law. See, e.g., In re Detention of Thorell, 149 Wn.2d 724, 72 P.3d 708 (2003).

The current statutory framework provides for two separate categories of trial proceedings. Within 45 days of a finding of probable cause on a commitment petition, see RCW 71.09.040, a respondent is entitled to a jury trial on the question of whether he or she is a sexually violent predator. RCW 71.09.050. The first set of instructions (and Comments) that follow in this chapter, WPI 365.01 through 365.21, are proposed for use in these initial civil commitment proceedings.

The second set of instructions, WPI 365.30 through 365.37, are proposed for use in conditional release (LRA) and unconditional discharge trials that potentially follow the initial civil commitment under the terms of RCW 71.09.090. The instructions for conditional, or unconditional, release trials are selected instructions rather than a full set. These selected instructions combine with other instructions in WPI Chapter 365 (Involuntary Treatment—Sexually Violent Predators) as required by the circumstances of the particular case.

The conditional release (LRA) procedures of the SVPA do not violate equal protection. In re Thorell, 149 Wn.2d 724, 72 P.3d 708 (2003). In *Thorell,* the Washington Supreme Court summarized the statutory shifts, including the impact of both the 1995 and 2001 amendments to the SVPA, summarized the sometimes conflicting cases interpreting the LRA provisions, and overruled In re Detention of Brooks, 145 Wn.2d 275, 36 P.3d 1034 (2001), to the extent it is inconsistent with *Thorell.*

Under *Thorell,* "those who meet the statutory definition and are committed as SVPs are not entitled to consideration of LRAs until their first annual review." In re Thorell, 149 Wn.2d at 751. At the show cause annual review hearing, the court must determine whether probable cause for LRA or unconditional release exists if the respondent requests a show cause hearing or refuses to waive the right to a show cause hearing. RCW 71.09.090.

At the show cause hearing, the State is required to present a prima facie case (typically with the RCW 71.09.070 annual review report) demonstrating that (1) the respondent's condition has not changed sufficiently, and therefore he or she continues to meet the definition of an SVP; and (2) any proposed LRA placement is not in the respondent's best interest and the proposed LRA will not adequately protect the community. RCW 71.09.090; In re Detention of Jones, 149 Wn.App. 16, 24–30, 201 P.3d 1066 (2009). A respondent is entitled to a full trial addressing either the LRA or unconditional release question, only if the court concludes that (1) the State has failed to put forward a prima facie case, or (2) the respondent has made an affirmative showing establishing probable cause to believe that his or her condition has changed due to continuing participation in treatment such that the respondent is appropriate for an LRA or unconditional release. In re Detention of Savala, 147 Wn.App. 798, 803, 199 P.3d 413 (2008).

The court, at the preliminary hearing, is not to weigh the evidence. In re Jacobson, 120 Wn.App.770, 778–81, 86 P.3d 1202 (2004) (superseded by statute on other grounds).

If the respondent is seeking conditional release to an LRA, he or she is required to propose a specific LRA that meets the five statutory requirements of RCW 71.09.092. In re Jones, 149 Wn.App. at 24–30. Provisions added to RCW 71.09.090 further limit the type of proof sufficient to support a new unconditional or conditional release trial. The Supreme Court in State v. McCuistion, 169 Wn.2d 633, 238 P.3d 1147 (2010), struck down the 2005 amendments to RCW 71.09.090, which purported to limit the type of evidence that could be considered by the court at the show cause hearing, as a violation of substantive due process, while leaving the basic statutory scheme intact. The 2010 *McCuistion* opinion was subsequently withdrawn and replaced by an opinion issued in 2012, which found no infirmity with the 2005 amendments. State v. McCuistion, 174 Wn.2d 369, 275 P.3d 1092 (2012).

Respondents committed under the SVPA who have satisfied the procedures of RCW 71.09.090, and who have overcome any summary judgment proceedings under RCW 71.09.094, are entitled to a trial addressing placement in an LRA and/or unconditional release. RCW 71.09.090. The protections afforded to a respondent at a commitment trial—including the right to a trial by jury and proof beyond a reason-

able doubt—are equally available in an LRA or unconditional release proceeding. RCW 71.09.090.

At a trial addressing release to a proposed LRA, the State must prove, beyond a reasonable doubt, that (1) the proposed less restrictive alternative placement plan is not in the respondent's best interests, or (2) the proposed plan does not include conditions that will adequately protect the community. RCW 71.09.090; In re Thorell, 149 Wn.2d at 746, 751–52. If the trial addresses the unconditional release question, the State must prove that "the committed person's condition remains such that the person continues to meet the definition of a sexually violent predator." RCW 71.09.090. Evidence of the prior commitment trial and disposition is admissible. RCW 71.09.090.

If a respondent prevails at an LRA trial, the procedures for effectuating a release are set forth in RCW 71.09.096. The statute provides an additional layer of community protection by allowing the trial court to supplement the LRA conditions that were presented to the jury. The court is required to order the Department of Corrections to investigate the proposed LRA and suggest any additional conditions. RCW 71.09.096.

The statute sets forth certain minimum requirements. The trial court is required to "impose any additional conditions necessary to ensure compliance with treatment and to protect the community." RCW 71.09.096. If the court finds that "conditions do not exist that will both ensure the person's compliance with treatment and protect the community, then the person shall be remanded to the custody of the department of social and health services for control, care and treatment in a secure facility." RCW 71.09.096(2). The timing of the release must also comply with other applicable statutes, including with regard to community notification. RCW 71.09.096(5)(b). The court is to receive monthly reports on the conditional release and is required to review the conditional release annually. RCW 71.09.096.

If the Department fails to conduct an annual review, the remedy available to a respondent is to hold a show cause hearing and not release from confinement. In re Detention of Rushton, 190 Wn.App 358, 374–378, 359 P.3d 935 (2015).

[Current as of October 2016.]

WPI 365.01

SEXUALLY VIOLENT PREDATORS—INITIAL COMMITMENT ADVANCE ORAL INSTRUCTION—VOIR DIRE

Part 1—Before Prospective Jurors are Questioned:

The State alleges that (name of respondent) is a sexually violent predator. Although this is a civil proceeding, the State must prove its case beyond a reasonable doubt and the jury must be unanimous in its decision.

You will be receiving specific instructions at the end of the case. I am giving you this preliminary instruction to assist you in answering questions during jury selection, which is sometimes called voir dire.

The purpose of this process is to make sure that we select a jury that is free from any outside or pre-existing bias that might interfere with the jury's ability to fairly decide the case based on the evidence and the law that you receive in this courtroom.

You have already met [Mr.] [Ms.] (name), our court bailiff. The bailiff's job is to assist you. If there is anything we can do to better accommodate you as a juror, please let the bailiff know. The bailiff will involve me if that is necessary. Please follow any instructions that [he] [she] gives you.

The court clerk is [Mr.] [Ms.] (name). The clerk's job is to mark and handle exhibits and other significant papers.

[The court reporter is [Mr.] [Ms.] (name). It is the court reporter's job to take verbatim notes of the proceedings.]

[In this courtroom we record all proceedings with a [video] [audio] recording system. All of the proceedings are preserved to create a "court record."]

This case was commenced by the filing of a petition by (name of petitioner). **The petitioner is represented by** (name of counsel). **The petition was filed against** (name of respondent), **who is represented by** (name of counsel).

In this proceeding, the State must prove all of the following elements beyond a reasonable doubt:

First, that (name of respondent) **has been convicted of a crime of sexual violence, namely** (identify crime of sexual violence);

Second, that (name of respondent) **suffers from a [mental abnormality] [or personality disorder] which causes serious difficulty in controlling [his] [her] sexually violent behavior[; and]**

Third, that this mental abnormality [or personality disorder] makes (name of respondent) **likely to engage in predatory acts of sexual violence if not confined to a secure facility[; and]**

[Fourth, that (name of respondent) **has committed a recent overt act].**

It is important that you discharge your duties without discrimination, meaning that bias regarding the race, color, religious beliefs, national origin, sexual orientation, gender, or disability of any party, any witnesses, and the lawyers should play no part in the exercise of your judgment throughout the trial. These are called "conscious biases"—and, when answering questions, it is important, even if uncomfortable for you, to share these views with the lawyers.

However, there is another more subtle tendency at work that we must all be aware of. This part of human nature is understandable but must play no role in your service as jurors. In our daily lives, there are many issues that require us to make quick decisions and then move on. In making these daily decisions, we may well rely upon

generalities, even what might be called biases or prejudices. That may be appropriate as a coping mechanism in our busy daily lives but bias and prejudice can play no part in any decisions you might make as a juror. Your decisions as jurors must be based solely upon an open-minded, fair consideration of the evidence that comes before you during trial.

In a moment, I am going to ask you some background questions and the lawyers will also have a chance to follow up with some questions of their own. Most importantly, you are to look within yourselves and see if there is anything there in your life experiences or your personal beliefs that might be such a strong influence that it would overcome your ability to serve as a fair and impartial juror. These questions may sometimes involve issues that are sensitive for you. If you are uncomfortable answering any particular question in front of the other jurors, please let me know or notify the bailiff. We may then discuss other ways to handle this question.

Before any questions are asked, an oath or affirmation will be administered. All of your answers must be open, honest, and forthright. At this time, I ask that you please rise, raise your right hand, and [I] [the clerk] will administer this oath.

> "Do you solemnly swear or affirm that you will truthfully answer such questions as may be asked of you by the court or the attorneys concerning your qualifications to act as jurors in this case? [Please respond.]"

The fact that a petition has been filed is not to be considered by you as any indication of the truth of the allegations contained in that petition.

It is your duty as a jury to decide the facts in this case based upon the evidence presented to you during this trial. Evidence is a legal term. Evidence includes such

things as testimony of witnesses, documents, or other physical objects.

During your deliberations, you must apply the law to the facts that you find to be true. It is your duty to accept the law from my instructions, regardless of what you personally believe the law is or what you think it ought to be. You are to apply the law you receive from my instructions to the facts and in this way decide the case.

(The judge explains the procedure for jury selection, and jury selection then begins.)

Part 2—After Jury is Selected:

I will now say a few words about the role and function each of us plays during a jury trial. Jury selection is important but what jurors say in jury selection is not evidence. From this point forward, it is essential that all of your decisions be based upon the evidence and the law that come to you in this courtroom and only in this courtroom.

You must not allow yourself to be exposed to any outside information about this case. Do not permit anyone to discuss or comment about it in your presence, and do not remain within hearing of such conversations. This includes electronic conversations as well as oral ones. You must keep your mind free of outside influences so that your decision will be based entirely on the evidence presented during the trial and on my instructions to you about the law.

Until you are dismissed at the end of this trial, you must avoid outside sources such as newspapers, magazines, blogs, the internet, or radio or television broadcasts which may discuss this case or issues involved in this trial. If you start to hear or read information about anything related to the case, you must act immediately so that you no longer hear or see it. By giving this instruction I do not

mean to suggest that this particular case is newsworthy; I give this instruction in every case.

During the trial, do not try to determine on your own what the law is. Do not seek out any evidence on your own. Do not consult dictionaries or other reference materials. Do not conduct any research into the facts, the issues, or the people involved in this case. This means you may not use [Google or other internet search engines] [internet resources] to look into anything at all related to this case. Do not inspect the scene of any event involved in this case. If your ordinary travel will result in passing or seeing the location of any event involved in this case, do not stop or try to investigate. You must keep your mind clear of anything that is not presented to you in this courtroom.

During the trial, do not provide information about the case to other people, including any of the lawyers, parties, witnesses, your friends, members of your family, or members of the media. If necessary, you may tell people (such as your employer or your child's daycare provider) that you are a juror and let them know when you need to be in court. If people ask you for more details, you should tell them that you are not allowed to talk about the case until it is over.

I want to emphasize that the rules prohibiting discussions include your electronic communications. You must not send or receive information about anything related to the case by any means, including by text messages, email, telephone, internet chat, blogs, or social networking web sites. Do not even mention being on a jury when using social media, such as updating your status on Facebook or sending a message on Twitter. You don't want to do anything that will invite others to talk to you about your jury duty.

In short, do not communicate with anyone, by any means, concerning what you see or hear in the courtroom,

and do not try to find out more about anything related to this case, by any means, other than what you learn in the courtroom. These rules ensure that the parties will receive a fair trial. If you have any questions about these restrictions, please contact [the bailiff] [(insert other appropriate staff person)].

If you become exposed to any information other than what you learn in the courtroom, that could be grounds for a mistrial. A mistrial would mean that all of the work that you and your fellow jurors put into this trial will be wasted. Re-trials are costly and burdensome to the parties and the public. Also, if you communicate with others in violation of my orders, you could be fined or held in contempt of court.

After you have delivered your verdict, you will be free to do any research you choose and to share your experiences with others.

Remember that all phones, laptops, and other communication devices must be turned off while you are in court and while you are in deliberations.

Throughout this trial, you must come and go directly from the jury room. [Follow the bailiff's instructions about where to wait in the courthouse and areas that you should avoid.] Do not remain in the hall or courtroom, as witnesses and parties may not recognize you as a juror, and you may accidentally overhear some discussion about this case. Even a communication about an unrelated topic might give a bad impression to others, therefore I have instructed the lawyers, parties, and witnesses not to greet or talk to you during trial.

I want to comment on one other aspect of your role and that is the importance of keeping an open mind throughout the various stages of these proceedings. The trial has a sensible order to it as each side presents and develops its position.

First: The lawyers will have an opportunity to make opening statements outlining the testimony of witnesses and other evidence that they expect to be presented during trial.

Next: The petitioner will present the testimony of witnesses or other evidence to you. When the petitioner has finished, the respondent may, but need not, present the testimony of witnesses or other evidence. Each witness may be cross-examined by the other side.

Next: When all of the evidence has been presented to you, I will tell you what law applies to this case. The law that applies will be set out in written instructions, which I will read out loud. You will have [individual copies of] the written instructions with you in the jury room during your deliberations.

Next: The lawyers will make closing arguments.

Finally: You will be taken to the jury room by the bailiff where you will select a presiding juror. The presiding juror will preside over your discussions of the case, which are called deliberations. You will then deliberate in order to reach a decision, which is called a "verdict." During your deliberations, you must apply the law that I provide to you in my instructions to the facts that you find to have been proven.

Until you are in deliberations, you must make sure you are maintaining open minds. If you were to form premature opinions about the case, this would interfere with your ability to get the benefit of each of the subsequent stages.

The attorneys' role is to represent and advocate for the positions of their respective clients. The lawyers' remarks, statements, and arguments are intended to help you understand the evidence and apply the law. However, the lawyers' statements are not evidence or the law. The

evidence is the testimony and the exhibits. The law is contained in my instructions. You must disregard anything the lawyers say that is at odds with the evidence or the law in my instructions.

You may hear objections made by the lawyers during trial. Each party has the right to object to questions asked by another lawyer. These objections should not influence you. Do not make any assumptions or draw any conclusions based on a lawyer's objections.

When there is an objection, it is my job to rule on it. One of my duties as judge is to decide whether or not evidence should be admitted during this trial. What this means is that I must decide whether or not you should consider evidence offered by the parties. For example, if a party offers a photograph as an exhibit, I will decide whether it is admissible. Do not be concerned about the reasons for my rulings. You must not consider or discuss any evidence that I do not admit or that I tell you to disregard.

Our state constitution prohibits a trial judge from making a comment on the evidence. For example, it would be improper for me to express my personal opinion about the value of a particular witness's testimony. Although I will not intentionally do so, if it appears to you that I have indicated my personal opinion concerning any evidence, you must disregard that opinion entirely. The reason for this constitutional rule is that it is solely the role of the jurors to weigh and evaluate the evidence in the case.

[You will be allowed to propose written questions to witnesses after the lawyers have completed their questioning. You may ask questions in order to clarify the testimony, but you are not to express any opinion about the testimony or argue with a witness. If you ask any questions, remember that your role is that of a neutral fact finder, not an advocate.]

[Before I excuse each witness, I will offer you the opportunity to write out a question on a form provided by the court. Do not sign the question. I will review the question to determine if it is legally proper.]

[There are some questions that I will not ask, or will not ask in the wording submitted by the juror. This might happen either due to the rules of evidence or other legal reasons, or because the question is expected to be answered later in the case. If I do not ask a juror's question, or if I rephrase it, do not attempt to speculate as to the reasons and do not discuss this circumstance with the other jurors.]

[By giving you the opportunity to propose questions, I am not requesting or suggesting that you do so. It will often be the case that a lawyer has not asked a question because it is legally objectionable or because a later witness may be addressing that subject.]

All proceedings in this trial are recorded [by the court reporter] [through electronic means]. Deliberating juries are rarely, if ever, given access to transcripts or recordings of trial testimony. For this reason, you must pay close attention as the testimony is being presented.

The related point is that you are allowed to take notes during trial. I am not instructing you to take notes, nor am I encouraging you to do so. Taking notes may interfere with your ability to listen and observe. If you choose to take notes, I must remind you to listen carefully to all testimony and to carefully observe all witnesses.

At an appropriate time, the bailiff will provide a note pad and a pen or pencil to each of you. Your juror number will be on the front page of the note pad. You must take notes on this pad only, not on any other paper. You must not take your note pad from the courtroom or the jury room for any reason. When you recess during the trial, please (insert appropriate instruction; see Note on Use). At the end of the

day, the note pads must be left (insert appropriate instruction; see Note on Use). While you are away from the courtroom or the jury room, no one else will read your notes.

You must not discuss your notes with anyone or show your notes to anyone until you begin deliberating on your verdict. This includes other jurors. During deliberation, you may discuss your notes with the other jurors or show your notes to them.

You are not to assume that your notes are necessarily more accurate than your memory. I am allowing you to take notes to assist you in remembering clearly, not to substitute for your memory. You are also not to assume that your notes are more accurate than the memories or notes of the other jurors.

After you have reached a verdict, your notes will be collected and destroyed by the bailiff. No one will be allowed to read them.

Now that you have been empaneled as jurors, you need to take another oath. Please stand and raise your right hand and [I] [the clerk] will administer this oath.

> "Do you solemnly swear or affirm that you will well and truly try this case and render a true verdict based upon the evidence and the law? Please respond."

Having taken your oath as jurors, you are now what the law calls officers of this court. As such, you must not let your emotions overcome your rational thought process. You must decide the case solely on the evidence and the law before you and must not be influenced by any personal likes or dislikes, opinions, prejudices, sympathy, or biases, including unconscious bias. Unconscious biases are stereotypes, attitudes, or preferences that people may consciously reject but may be expressed without conscious awareness, control, or intention. Like conscious

bias, unconscious bias, too, can affect how we evaluate information and make decisions.

To assure that all parties receive a fair trial, you must act impartially with an earnest desire to reach a just and proper verdict.

Thank you for your willingness to serve this court and our system of justice.

NOTE ON USE

Use this instruction for trials concerning initial commitments as an SVP. For trials concerning conditional release (LRA) or unconditional discharge, use WPI 365.30 (Sexually Violent Predators—Conditional Release (LRA)—Unconditional Discharge—Advance Oral Instruction—Voir Dire).

This is not one of the written instructions on the law. Part 1 of this instruction is to be read to the jury panel before jury selection begins. Part 2 is to be read after jury selection has been completed. A decision must be made as to how much of this advance oral instruction, WPI 365.01, is appropriate in a particular case.

In the paragraphs addressing juror note-taking, insert an appropriate direction to jurors regarding where to leave their notes during court recesses, such as "leave your notepad on your chair" or "take your note pad with you to the jury room." Also insert an appropriate instruction regarding where jurors are to leave their note pads at the end of the day, such as "in the jury room" or "on your chair."

The instruction's paragraphs about prohibited juror communications and avoiding outside information about the trial are intended for routine cases. For a higher publicity case, the judge should consider expanding on these provisions.

The court may want to remind jurors before each recess to avoid the internet and especially to refrain from conducting internet research. See WPI 6.02 (Before Recesses).

For a discussion of the bracketed paragraphs addressing jurors' questions for witnesses, see the Comment below.

See the Note on Use for WPI 365.10 (Sexually Violent Predators—Elements for Commitment).

This instruction will need to be modified to address any of the following unusual circumstances: (1) when the first element depends not on a criminal conviction but on a finding of incompetence or insanity; (2) when the first element depends on an out-of-state conviction; or (3) when the first element depends on a criminal conviction, but the State still needs to prove sexual motivation before the offense can qualify as a crime of sexual violence.

COMMENT

This instruction is modeled after the standard advance oral instruction for civil cases as modified to fit SVP commitment cases. See WPI 1.01 (Advance Oral Instruction—Beginning of Proceedings).This instruction has been revised for this edition.

Unconscious and conscious bias. This instruction incorporates, in several places, new language concerning both unconscious and conscious bias.

In drafting the language on implicit and explicit bias, the WPI Committee carefully reviewed the preliminary oral instructions recently adopted for use in criminal cases in the United States District Court, Western District of Washington. There are slight modifications and additions designed, in part, to avoid the state constitutional provision on commenting on the evidence. Wash. Const. art IV, § 16. The original instructions from the district court are set forth at http://www.wawd.uscourts.gov/jury/unconscious-bias (last visited November 15, 2017).

A trial court is not constitutionally-required to *sua sponte* question potential jurors about potential racial bias or to instruct on such issues. State v. Davis, 141 Wn.2d 798, 826–34, 10 P.3d 977 (2000) (death penalty case). The *Davis* court discussed the possibility of "unnecessarily bringing [issues of race] to the attention of jurors" by such inquiry when not requested by defense counsel. *Davis* relied heavily on jurisprudence from the United States Supreme Court, in particular on the death penalty case of Turner v. Murray, 476 U.S. 28, 106 S.Ct. 1683, 90 L.Ed.2d 27 (1986), and contains a thorough review of federal case law.

The United States Supreme Court in Peña-Rodriguez v. Colorado, __ U.S. __, 137 S.Ct. 855, 869, 197 L.Ed.2d 107 (2017), concluded that the general rule against impeaching a jury verdict must fall when a juror has indicated that he or she relied on racial animus or stereotypes in reaching the verdict. In Turner v. Stime, 153 Wn.App. 581, 222 P.3d 1243 (2009), the court concluded that statements of clear racial bias made by a juror concerning plaintiff's counsel do not "inhere in the verdict" and that it was proper for the trial court to grant a new trial upon proof that such statements were made.

The Washington Supreme Court has emphasized the dangers of

racial bias impacting the fairness of a trial. For example, in State v. Monday, 171 Wn.2d 667, 257 P.3d 551 (2011), the court unanimously reversed a conviction for prosecutorial misconduct in referring to an "anti-snitch code" allegedly prevalent in the African-American community, concluding that when racial bias is shown, it becomes the State's burden to show harmlessness beyond a reasonable doubt. See also City of Seattle v. Erickson, 188 Wn.2d 721, 398 P.3d 1124 (2017) (when the sole member of a racially cognizable group has been subject to a preemptory challenge by the State, a prima facie case of discriminatory purpose has been established).

Voir Dire. The term voir dire has been replaced by jury selection in several places in the instruction for the purpose of better juror comprehension. No substantive change is intended.

Questioning jurors individually. Although this is more common in criminal cases than in civil, the subject matter of the trial may make it necessary to conduct individual questioning on particularly sensitive or private matters. If a juror expresses discomfort in answering such questions in front of the entire panel or if the court determines that all jurors should be questioned individually given the subject matter, individual questioning can occur. Individual questioning may also be warranted when there is a concern that the panel may be unduly influenced by the answers of other potential jurors or if there has been substantial media interest in the case. However, the courtroom must not be closed to the public unless the *Ishikawa* factors are met and the court's findings included in the record. Seattle Times Co. v. Ishikawa, 97 Wn.2d 30, 640 P.2d 716 (1982). Accord, State v. Bone-Club, 128 Wn.2d 254, 906 P.2d 325 (1995).

Absent *Ishikawa* findings on the record, the courtroom is open during individual questioning of prospective jurors to all members of the public and to the media. It is only the other jurors who are not present for the individual questioning. See State v. Strode, 167 Wn.2d 222, 217 P.3d 310 (2009). It should be noted that when a juror questionnaire is used as part of jury selection, review of the completed questionnaire in chambers, as a general rule, does not violate the clear mandate of the Washington Constitution, Article I, § 10 that "justice in all cases shall be administered openly." State v. Slert, 181 Wn.2d 598, 602–608, 334 P.3d 1088 (2014). Although the Supreme Court in *Slert* reversed the Court of Appeals as to its specific conclusion, the Court of Appeals decision does contain a thorough discussion of the law in this area. State v. Slert, 169 Wn.App. 766, 282 P.3d 101 (2012).

The instruction includes bracketed paragraphs that deal with jurors proposing questions for witnesses. CR 43(k), as amended in 2002, requires a court to permit jury questions in all civil matters. The civil rules apply to SVP proceedings except when inconsistent with the statu-

tory framework of RCW Chapter 71.09. See In re Detention of Williams, 147 Wn.2d 476, 488, 55 P.3d 597 (2002) (analyzing the rule for special proceedings, CR 81(a)). The SVPA is silent on the question of whether jurors should be permitted to ask questions of witnesses. Thus, on its face, it would appear that CR 43(k) applies to SVP proceedings.

[Current as of March 2018.]

WPI 365.02

SEXUALLY VIOLENT PREDATORS—CONCLUSION OF TRIAL—INTRODUCTORY INSTRUCTION

It is your duty to decide the facts in this case based upon the evidence presented to you during this trial. It also is your duty to accept the law as I explain it to you, regardless of what you personally believe the law is or what you personally think it should be. You must apply the law from my instructions to the facts that you decide have been proved, and in this way decide the case. The fact that the State has initiated this proceeding is not to be considered by you as any indication of the truth of the allegations.

The evidence that you are to consider during your deliberations consists of the testimony that you have heard from witnesses[, and the exhibits that I have admitted,] during the trial. If evidence was not admitted or was stricken from the record, then you are not to consider it in reaching your verdict.

[Exhibits may have been marked by the court clerk and given a number, but they do not go with you to the jury room during your deliberations unless they have been admitted into evidence. The exhibits that have been admitted will be available to you in the jury room.]

In deciding this case, you must consider all of the evidence that I have admitted. Each party is entitled to the benefit of all of the evidence, whether or not that party introduced it.

You are the sole judges of the credibility of each witness and of the value or weight to be given to the testimony of each witness. In assessing credibility, you must avoid bias, conscious or unconscious, including bias based on religion, ethnicity, race, sexual orientation, gender or disability.

In considering a witness's testimony, you may consider these things: the opportunity of the witness to observe or know the things they testify about; the ability of the witness to observe accurately; the quality of a witness's memory while testifying; the manner of the witness while testifying; any personal interest that the witness might have in the outcome or the issues; any bias or prejudice that the witness may have shown; the reasonableness of the witness's statements in the context of all of the other evidence; and any other factors that affect your evaluation or belief of a witness or your evaluation of his or her testimony.

One of my duties has been to rule on the admissibility of evidence. Do not be concerned during your deliberations about the reasons for my rulings on the evidence. If I have ruled that any evidence is inadmissible, or if I have asked you to disregard any evidence, then you must not discuss that evidence during your deliberations or consider it in reaching your verdict.

The law does not permit me to comment on the evidence in any way. I would be commenting on the evidence if I indicated my personal opinion about the value of testimony or other evidence. Although I have not intentionally done so, if it appears to you that I have indicated my personal opinion, either during trial or in giving these instructions, you must disregard it entirely.

The comments of the lawyers during this trial are intended to help you understand the evidence and apply the law. However, it is important for you to remember that the lawyers' remarks, statements, and arguments are not evidence. You should disregard any remark, statement, or argument that is not supported by the evidence or the law as I have explained it to you.

You may have heard objections made by the lawyers during trial. Each party has the right to object to questions asked by another lawyer. These objections should

not influence you. Do not make any assumptions or draw any conclusions based on a lawyer's objections.

As jurors, you have a duty to consult with one another and to deliberate with the intention of reaching a verdict. Each of you must decide the case for yourself, but only after an impartial consideration of all of the evidence with your fellow jurors. Listen to one another carefully. In the course of your deliberations, you should not hesitate to re-examine your own views and to change your opinion based upon the evidence. You should not surrender your honest convictions about the value or significance of evidence solely because of the opinions of your fellow jurors. Nor should you change your mind just for the purpose of reaching a unanimous verdict.

As jurors, you are officers of this court. You must not let your emotions overcome your rational thought process. You must reach your decision based on the facts proved to you and on the law given to you, not on sympathy, bias, or personal preference. To assure that all parties receive a fair trial, you must act impartially with an earnest desire to reach a proper verdict.

Finally, the order of these instructions has no significance as to their relative importance. They are all important. In closing arguments, the lawyers may properly discuss specific instructions, but you must not attach any special significance to a particular instruction that they may discuss. During your deliberations, you must consider the instructions as a whole.

NOTE ON USE

Give this instruction in every sexually violent predator case: it applies to initial commitment trials, as well as conditional release (LRA) trials and unconditional release trials. This instruction is the first of the written instructions given to the jury at the end of the trial.

COMMENT

This instruction is adapted from WPI 1.02 (Conclusion of Trial—Introductory Instruction), to fit a sexually violent predator proceeding.

[Current as of March 2018.]

WPI 365.03

BASIS OF EXPERT OPINION—LIMITING INSTRUCTION

[Generally, witnesses testify only to things they observe. However, some witnesses are permitted to give their opinions in addition to their observations. In order to assist you in evaluating an opinion, a witness may be allowed to give the basis for the opinion. In some circumstances, testimony about the basis for an opinion is not appropriate for you to consider for other purposes. In that instance, I will call to your attention the limited purpose for which the evidence may properly be considered.]

(Name of witness) **[is about to testify] [has testified] regarding** (identify nature of testimony)**, which is part of the basis for [his] [her] opinion. You may consider this testimony only in deciding what credibility and weight should be given to the opinions of** (name of witness)**. You may not consider it as evidence that the information relied upon by the witness is true or that the events described actually occurred.**

NOTE ON USE

This is an oral instruction to be used during testimony when an expert witness testifies to hearsay, or to otherwise inadmissible evidence, that was used as part of the basis of the witness's opinions. Do not use this instruction if the hearsay is admissible as substantive evidence.

Use both paragraphs the first time that an expert witness is allowed to testify to inadmissible evidence. Use the second paragraph each subsequent time that the issue arises. The court may also repeat the first paragraph as necessary to refresh the jury's recollection.

COMMENT

Under ER 703, an expert witness may testify to facts on which his or her opinion is based, if those facts are of a type reasonably relied on by experts in the particular field in forming opinions on the subject. The underlying facts need not be otherwise admissible.

For example, an expert may testify to hearsay on which he or she reasonably relied. Under these circumstances, the hearsay is admitted only to explain the basis for the expert's opinion. Unless the hearsay is admissible on some other basis, it cannot be considered as substantive evidence. Grp. Health Co-op. of Puget Sound, Inc. v. Dep't. of Revenue, 106 Wn.2d 391, 399–400, 722 P.2d 787 (1986); see Tegland, 5B Wash. Prac., Evidence Law and Practice § 705.5 (6th ed.). Accord, In re Detention of Marshall, 122 Wn.App. 132, 144–46, 90 P.3d 1081 (2004) (expert can base opinion on confidential records that, themselves, would be inadmissible as hearsay).

A party is entitled to a limiting instruction upon request when evidence has been admitted for a limited purpose. ER 105.

[Current as of October 2016.]

WPI 365.04

OPINION TESTIMONY—LIMITATION ON CONSIDERATION OF EVIDENCE

A witness who has special training, education, or experience in a particular science, profession, or calling may be allowed to express an opinion in addition to giving testimony as to facts. You are not, however, required to accept his or her opinion. To determine the credibility and weight to be given to this type of evidence, you may consider, among other things, the education, training, experience, knowledge, and ability of that witness, the reasons given for that opinion, the sources of the witness's information, together with the factors already given you for evaluating the testimony of any other witness.

[When (name of witness) **testified, I informed you that some information was admitted as part of the basis for [his] [her] opinion, but may not be considered for other purposes. You must not consider this testimony as proof that the information relied upon by the witness is true. You may use this testimony only for the purpose of deciding what credibility or weight to give the witness's opinion.]**

NOTE ON USE

Use this written instruction if requested.

When practical, the instruction may also identify the particular evidence to which the instruction applies to (e.g., information contained in a police report or medical report).

Use the second paragraph only if a limiting instruction was given during the trial.

COMMENT

See the Comment to WPI 2.10 (Expert Testimony); WPI 365.03 (Basis of Expert Opinion—Limiting Instruction).

[Current as of October 2016.]

WPI 365.10

SEXUALLY VIOLENT PREDATORS—ELEMENTS FOR COMMITMENT

To establish that (respondent's name) **is a sexually violent predator, the State must prove each of the following elements beyond a reasonable doubt:**

(1) That (respondent's name) **has been convicted of a crime of sexual violence, namely** (identify crime of sexual violence)**;**

(2) That (respondent's name) **suffers from a [mental abnormality] [or personality disorder] which causes serious difficulty in controlling [his] [her] sexually violent behavior[; and]**

(3) That this [mental abnormality] [or personality disorder] makes (respondent's name) **likely to engage in predatory acts of sexual violence if not confined to a secure facility[; and]**

[(4) That (respondent's name) **has committed a recent overt act].**

If you find from the evidence that each of these elements has been proved beyond a reasonable doubt, then it will be your duty to return a verdict that (respondent's name) **is a sexually violent predator.**

On the other hand, if, after weighing all of the evidence, you have a reasonable doubt as to any one or more of these elements, then it will be your duty to return a verdict that (respondent's name) **is not a sexually violent predator.**

NOTE ON USE

Use this instruction with the following instructions, as appropriate: WPI 365.11 for defining "reasonable doubt"; WPI 365.12 for defining "mental abnormality"; WPI 365.12.01 for defining "personality disorder"; WPI 365.13 for defining "predatory"; WPI 365.14 for defining

"likely to engage"; and WPI 365.16 for defining "sexual violence." There is no pattern instruction defining "secure facility." See the Comment to WPI 365.14 (Sexually Violent Predators—Likely To Engage—Definition).

In elements (2) and (3), use the bracketed "mental abnormality" and/or "personality disorder" language in accord with the evidence presented at trial. Use the bracketed element (4) only when a recent overt act must be proved. If the bracketed element (4) is used, also use WPI 365.15 (Sexually Violent Predators—Recent Overt Act—Definition).

Fill in the name of the particular crime of sexual violence where indicated. For a list of offenses that qualify as crimes of sexual violence, see the Comment to WPI 365.16 (Sexually Violent Predators—Sexual Violence—Definition).

This instruction will need to be modified to address any of the following unusual circumstances: (1) when the first element depends not on a criminal conviction but on a finding of incompetence or insanity; (2) when the first element depends on an out-of-state conviction; or (3) when the first element depends on a criminal conviction, but the State still needs to prove sexual motivation before the offense can qualify as a crime of sexual violence.

COMMENT

This instruction is similar to that approved by the Supreme Court. See In re Turay, 139 Wn.2d 379, 986 P.2d 790 (1999); In re Thorell, 149 Wn.2d 724, 72 P.3d 708 (2003). The above elements are set forth in the various RCW 71.09.020 definitions and RCW 71.09.060.

Burden of proof. Although a commitment pursuant to the Sexually Violent Predator Act is a civil commitment, RCW 71.09.060 requires that the respondent's status as a sexually violent predator be proved beyond a reasonable doubt. See generally In re Young, 122 Wn.2d 1, 857 P.2d 989 (1993).

The State is not required to prove that the respondent is "highly likely" to engage in predatory acts. Due process is satisfied by the statutory requirement that the State prove, beyond a reasonable doubt, that the respondent is likely to engage in such acts. In re Brooks, 145 Wn.2d 275, 36 P.3d 1034 (2001), overruled on other grounds in In re Thorell, 149 Wn.2d 724, 72 P.3d 708 (2003). Accord In re Young, 122 Wn.2d at 32 n. 9; In re Turay, 139 Wn.2d at 407–08, 986 P.2d 790.

Statistical likelihood of re-offending, underlying facts supporting the petition, and expert opinions are examples of evidence that will support the "more probably than not" standard in RCW 71.09.020, fulfilling

the requirement of proving dangerousness. In re Moore, 167 Wn.2d 113, 124–25, 216 P.3d 1015 (2009); see also State v. Hoisington, 123 Wn.App. 138, 147–49, 94 P.3d 318 (2004) (combination of evidence found sufficient to prove likelihood that respondent will re-offend with predatory acts of violence).

Recent overt act. The bracketed element (4) is to be used only when a recent overt act must be proved. See RCW 71.09.030; 71.09.060(1); Henrickson v. State, 140 Wn.2d 686, 2 P.3d 473 (2000); In re Albrecht, 147 Wn.2d 1, 11, 51 P.3d 73 (2002); Paschke v. State, 121 Wn.App. 614, 90 P.3d 74 (2004). The recent overt act requirement is mandated by due process in cases in which the respondent has been released from confinement since his or her last sex offense, but before SVP proceedings are initiated, because the State must prove current dangerousness. In re Young, 122 Wn.2d 1, 40–42, 857 P.2d 989 (1993); In re Hovinga, 132 Wn.App. 16, 21–23, 130 P.3d 830 (2006).

Whether a respondent is incarcerated for a sexually violent offense or for a recent overt act on the date the petition is filed is a question to be determined by the court pre-trial. In re Marshall, 156 Wn.2d 150, 158, 125 P.3d 111 (2005); In re Brown, 154 Wn.App. 116, 122–29, 225 P.3d 1028 (2010). For a useful summary of "recent overt act" case law, see In re Turay, 150 Wn.2d 71, 74 P.3d 1194 (2003), which was decided on procedural grounds, and In re Fair, 167 Wn.2d 357, 362–66, 219 P.3d 89 (2009).

Serious difficulty controlling behavior. In Kansas v. Hendricks, 521 U.S. 346, 117 S.Ct. 2072, 138 L.Ed.2d 501 (1997), the United States Supreme Court upheld the Kansas sexual predator act—an act similar to Washington's—against a substantive due process challenge. In Kansas v. Crane, 534 U.S. 407, 122 S.Ct. 867, 151 L.Ed.2d 856 (2002), the United States Supreme Court reiterated its prior rule that confinement based only on concerns that a sex offender is dangerous cannot pass constitutional muster. The Court emphasized that:

> *Hendricks* underscored the constitutional importance of distinguishing a dangerous sexual offender subject to civil commitment "from other dangerous persons who are perhaps more properly dealt with exclusively through criminal proceedings." That distinction is necessary lest "civil commitment" become a "mechanism for retribution or general deterrence"—functions properly those of criminal law, not civil commitment.

Kansas v. Crane, 534 U.S. at 412 (quoting Kansas v. Hendricks, 521 U.S. at 360).

The Court further commented that "civil commitment of dangerous sexual offenders will normally involve individuals who find it particularly difficult to control their behavior[.]" Kansas v. Crane, 534 U.S. at

414. Although total lack of ability to control behavior is not required, the Court indicated that the Constitution does not permit "commitment of the type of dangerous sexual offender considered in *Hendricks* without any lack of control determination. . . . [T]here must be proof of serious difficulty in controlling behavior." Kansas v. Crane, 534 U.S. at 413.

In *Thorell*, the Washington Supreme Court held that the jury is not required to make a separate finding on whether a respondent has serious difficulty controlling his or her sexually violent behavior. Nonetheless, the court suggested that "including an instruction on the serious lack of volitional control in future SVP cases will assist in appellate review and is therefore the better practice." In re Thorell, 149 Wn.2d at 745 n.8. A similar "best practices" recommendation was made by the Arizona Supreme Court in In re Leon G., 204 Ariz. 15, 59 P.3d 779 (2002)—a decision relied upon throughout the *Thorell* opinion.

Jury unanimity. The Washington Supreme Court and the Court of Appeals have interpreted the SVPA provisions about personality disorder and mental abnormality as sometimes being different and completely separate grounds, but other times being connected and inseparable. See In re Halgren, 156 Wn.2d 795, 810–12, 132 P.3d 714, 721–22; In re Sease, 149 Wn.App. 66, 75–79, 201 P.3d 1078 (2009); In re Pouncy, 144 Wn.App. 609, 618–20, 184 P.3d 651 (2008), affirmed, 168 Wn.2d 382, 229 P.3d 678 (2010). Of course, if there is no evidence proferred as to one of these two alternatives (personality disorder or mental abnormality), the jury must not be instructed as to that alternative. In re Halgren, 156 Wn.2d at 811–12; In re Sease, 149 Wn.App.at 75–76.

When evidence is proferred as to several possible personality disorders, the jury need not be unanimous as to which diagnosis is appropriate. In re Sease, 149 Wn.App. 66, 76–79, 201 P.3d 1078 (2009).

[Current as of October 2016.]

WPI 365.11

SEXUALLY VIOLENT PREDATORS—REASONABLE DOUBT—DEFINITION

The State has filed a petition alleging that (fill in name of respondent) **is a sexually violent predator. As the petitioner, the State has the burden of proving each element beyond a reasonable doubt. There is no burden on** (fill in name of respondent) **to establish the existence of a reasonable doubt.**

A reasonable doubt is one for which a reason exists and may arise from the evidence or lack of evidence. It is such a doubt as would exist in the mind of a reasonable person after fully, fairly, and carefully considering all of the evidence or lack of evidence. [If, from such consideration, you have an abiding belief in the truth of the allegations, you are satisfied beyond a reasonable doubt.]

NOTE ON USE

Use the unbracketed language in every case. For a discussion of the bracketed sentence on abiding belief, see the Comment to WPIC 4.01 (Burden of Proof—Presumption of Innocence—Reasonable Doubt).

COMMENT

The pattern instruction follows the general approach of the criminal pattern instruction that defines reasonable doubt, WPIC 4.01. For further discussion of issues related to defining reasonable doubt, see the Comment to WPIC 4.01 (Burden of Proof—Presumption of Innocence—Reasonable Doubt).

RCW 71.09.060 requires the State to prove that the respondent is a sexually violent predator beyond a reasonable doubt. In addition, the jury must be unanimous before a verdict can be returned. RCW 71.09.060(1); In re Young, 122 Wn.2d 1, 48, 857 P.2d 989 (1993) (interpreting a prior version of the statute). However, a commitment under RCW Chapter 71.09 is civil in nature and the respondent is not afforded criminal protections "beyond those supplied in the statute and those granted in *Young*." In re Twining, 77 Wn.App. 882, 895, 894 P.2d 1331 (1995) (no error to decline to instruct that the respondent is presumed not to be a sexually violent predator), overruled on other grounds in In re Pouncy, 168 Wn.2d 382, 229 P.3d 678 (2010).

The Washington Sexually Violent Predator Act has been upheld against a challenge that its real impact is punitive and that a commitment pursuant to the SVPA subjects a respondent to double jeopardy. Seling v. Young, 531 U.S. 250, 121 S.Ct. 727, 148 L.Ed.2d 734 (2001).

The Washington State Supreme Court, in the criminal context, has required the use of WPIC 4.01 (Burden of Proof—Presumption of Innocence—Reasonable Doubt) and has rejected attempts to formulate alternative definitions of reasonable doubt. State v. Bennett, 161 Wn.2d 303, 307–18, 165 P.3d 1241 (2007). The reasoning of *Bennett* is equally applicable to proceedings under RCW Chapter 71.09.

It is error to fail to define the phrase "reasonable doubt." State v. McHenry, 88 Wn.2d 211, 214, 558 P.2d 188 (1977).

[Current as of October 2016.]

WPI 365.12

SEXUALLY VIOLENT PREDATORS—MENTAL ABNORMALITY—DEFINITION

"Mental abnormality" means a congenital or acquired condition affecting the emotional or volitional capacity which predisposes the person to commit criminal sexual acts to a degree that makes the person a menace to the health and safety of others.

"Volitional capacity" means the power or capability to choose or decide.

NOTE ON USE

Use this instruction in every case involving evidence of a mental abnormality.

COMMENT

The first paragraph of this instruction uses the definition of "mental abnormality" set forth in RCW 71.09.020, with minor modifications for better juror comprehension.

The second paragraph, defining volitional capacity, is included because the term "volitional capacity" is used in the statutory definition of "mental abnormality" and may not be readily understandable by a jury without further clarification.

[Current as of October 2016.]

WPI 365.12.01

PERSONALITY DISORDER—DEFINITION

"Personality disorder" means an enduring pattern of inner experience and behavior that deviates markedly from the expectations of the individual's culture, is pervasive and inflexible, has onset in adolescence or early adulthood, is stable over time, and leads to distress or impairment.

NOTE ON USE

Use in all cases in which there is expert testimony from a psychiatrist or licensed psychologist that the respondent suffers from a personality disorder.

COMMENT

This instruction should be given in every case involving testimony from a psychiatrist or licensed psychologist diagnosing the respondent with a personality disorder. In re Pouncy, 168 Wn.2d 382, 229 P.3d 678 (2010). The Supreme Court in *Pouncy* overruled, in part, In re Twining, 77 Wn.App. 882, 894 P.2d 1331 (1995), which held that such an instruction is not required. Both *Pouncy* and *Twining* were decided before the 2009 amendment to RCW 71.09.020, which, for the first time, added a statutory definition of "personality disorder."

[Current as of October 2016.]

WPI 365.13

SEXUALLY VIOLENT PREDATORS—PREDATORY—DEFINITION

"Predatory" means acts directed toward [strangers] [or] [individuals with whom the respondent has established or promoted a relationship for the primary purpose of victimization] [or] [persons of casual acquaintance with whom no substantial personal relationship exists].

NOTE ON USE

Use in every case, selecting from the bracketed phrases as appropriate.

COMMENT

RCW 71.09.020.

[Current as of October 2016.]

WPI 365.14

SEXUALLY VIOLENT PREDATORS—LIKELY TO ENGAGE—DEFINITION

"Likely to engage in predatory acts of sexual violence if not confined in a secure facility" means that the person more probably than not will engage in such acts if released [unconditionally] from detention in this proceeding.

[In determining whether the respondent is likely to engage in predatory acts of sexual violence if not confined to a secure facility, you may consider all evidence that bears on the issue. In considering [placement conditions or] voluntary treatment options, however, you may consider only [placement conditions or] voluntary treatment options that would exist if the respondent is unconditionally released from detention in this proceeding.]

NOTE ON USE

The first paragraph should be used in all cases. The bracketed word "unconditionally" should be removed when there is evidence that the respondent will be under court-imposed conditions or on community custody following release.

The bracketed second paragraph should be used when evidence of "voluntary treatment" or "placement conditions" has been introduced into evidence. Use the bracketed phrase "placement conditions" only if the evidence indicates that the respondent will be subject to court-ordered supervision, even if released on the predator petition.

COMMENT

The State need not prove that the respondent is likely to engage in predatory behavior in the foreseeable future. Rather, the State is simply required "to prove that the alleged SVP is mentally ill and currently dangerous." In re Moore, 167 Wn.2d 113, 124–25, 216 P.3d 1015 (2009). Statistical likelihood of re-offending, underlying facts supporting the petition, and expert opinions are examples of evidence that will support the "more probably than not" standard in RCW 71.09.020, fulfilling the requirement of current dangerousness. In re Moore, 167 Wn.2d at 124–25; see also State v. Hoisington, 123 Wn.App. 138, 147–49, 94 P.3d 318 (2004).

In assessing respondent's risk to commit future acts of sexual violence, the finder of fact is limited to consideration of conditions that respondent would face if the SVP petition were dismissed. RCW 71.09.020(7).

Although a discussion of evidence admissibility is beyond the scope of this Comment, the above instruction allows consideration of respondent's voluntary measures to reduce his or her risk to the community and consideration of court-ordered conditions that would exist if the SVP petition were dismissed. In general, voluntary measures include things such as respondent's promise to engage in community treatment regardless of commitment status. "Conditions that would exist" are typically pre-existing community supervision conditions placed on respondent in connection with a prior criminal conviction. The *Thorell* decision includes a discussion of what evidence the finder of fact may consider. In re Thorell, 149 Wn.2d 724, 751–52, 72 P.3d 708 (2003).

Because of the possibility of juror confusion when a respondent will be subject to conditions upon release from confinement, the court may wish to remove the word "unconditionally" from the first paragraph of this instruction. A jury can consider conditions to which the respondent will be subject, such as conditions of community custody, in determining whether the respondent is likely to engage in predatory acts of sexual violence if released.

The WPI Committee recommends that the term "secure facility" not be defined for the jury. This term is relevant in a commitment proceeding only as part of the larger phrase "likely to engage in predatory acts of sexual violence if not confined in a secure facility." As discussed above, this phrase carries a particular meaning and limits jury consideration to particular types of evidence. Defining security facility outside the context of this phrase adds nothing to the commitment trial instructions. Indeed, in the context of a commitment trial, the statutory definition of secure facility is wholly circular—it includes any place (including private homes and half-way houses) where sexually violent predators are placed. RCW 71.09.020.

[Current as of October 2016.]

WPI 365.15

SEXUALLY VIOLENT PREDATORS—RECENT OVERT ACT—DEFINITION

"Recent overt act" means any act or threat or combination thereof that has either caused harm of a sexually violent nature or creates a reasonable apprehension of such harm in the mind of an objective person who knows of the history and mental condition of the person engaging in the act or behaviors.

NOTE ON USE

Use this instruction when a "recent overt act" must be proved.

COMMENT

RCW 71.09.020.

The court will make a pretrial ruling as a matter of law whether the State is required to plead and prove a recent overt act. See the Comment to WPI 365.10 (Sexually Violent Predators—Elements for Commitment). Use this instruction when a "recent overt act" is required under RCW 71.09.030 or under the due process clause. See In re Moore, 167 Wn.2d 113, 124–25, 216 P.3d 1015 (2009); In re Turay, 150 Wn.2d 71, 74 P.3d 1194 (2003); In re Albrecht, 147 Wn.2d 1, 51 P.3d 73 (2002), on remand, In re Albrecht, 129 Wn.App. 243, 256–57, 118 P.3d 909 (2005) (evidence was sufficient to prove recent overt act when respondent offered a boy money to follow him, then attempted to grab the boy's arm; respondent was a diagnosed pedophile who had a 20-year history of sexually molesting children using the specific grooming technique that he again employed with this boy); Henrickson v. State, 140 Wn.2d 686, 2 P.3d 473 (2000); In re Broten, 115 Wn.App. 252, 62 P.3d 514 (2003); In re Davis, 109 Wn.App. 734, 37 P.3d 325 (2002).

The jury is not required to be unanimous as to whether the "recent overt act" was a threat or an actual act. In re Aston, 161 Wn.App 824, 251 P.3d 917 (2011).

[Current as of October 2016.]

WPI 365.16

SEXUALLY VIOLENT PREDATORS—SEXUAL VIOLENCE—DEFINITION

"Sexual violence" [or] ["harm of a sexually violent nature"] means: (identify the applicable crimes).

NOTE ON USE

Based on the evidence in the case, fill in the blank with the following crimes of sexual violence: (1) those with which the respondent has allegedly been charged or convicted; (2) those that the respondent is likely to commit in the future; (3) those that constituted "recent overt acts" (when proof of such an act is necessary). For predicted future offenses and "recent overt acts," the court should also give instructions defining the elements of those crimes, as well as any instructions necessary to define terms used in those instructions. See the Comment below.

Use the bracketed phrase if the court is also giving WPI 365.15 (Sexually Violent Predators—Recent Overt Act—Definition).

COMMENT

Use of instruction. This definition is relevant to three aspects of a sexually violent predator proceeding. First, the State must prove that the respondent is likely to engage in predatory acts of sexual violence in the future. Second, the State must prove that he or she has been convicted or charged with a crime of sexual violence in the past. If the State is relying on a past crime of which the respondent was not convicted, the court should follow the procedure set out in RCW 71.09.060(2). Third, the State is sometimes required to prove commission of "a recent overt act." Such an act requires either harm of a sexually violent nature or a reasonable apprehension of such harm. RCW 71.09.020.

Crimes of sexual violence. Crimes of sexual violence include crimes defined in the following instructions: WPIC 40.01 (Rape—First Degree—Definition); WPIC 44.10 (Rape of a Child—First Degree—Definition); WPIC 44.12 (Rape of a Child—Second Degree—Definition); WPIC 44.20 (Child Molestation—First Degree—Definition); and WPIC 44.22 (Child Molestation—Second Degree—Definition). The definition also includes convictions under the following repealed statutes: first degree statutory rape (former RCW 9A.44.070); second degree statutory rape (former RCW 9A.44.080); and indecent liberties against a child under age 14 (former RCW 9A.44.100(1)(b)). The definition also includes

any offense under former law, or any federal or out-of-state offense, that is comparable to one of these crimes. The court will need to determine whether any such prior offenses are sufficiently comparable to warrant inclusion in the definition of "sexual violence."

A few crimes are classified as "sexually violent" offenses only if additional elements are proved. Second degree rape and indecent liberties are "sexually violent" only if committed by forcible compulsion. To define these crimes, the court can use WPIC 41.01 (Rape—Second Degree—Definition) and WPIC 49.01 (Indecent Liberties—Definition). The court should omit the bracketed language dealing with all alternatives other than forcible compulsion.

Incest is classified as a "sexually violent" offense only if the victim was under the age of 14. To define this crime, the court can use WPIC 46.03 (Incest—First Degree—Definition), and WPIC 46.05 (Incest—Second Degree—Definition), adding a requirement that the victim be under the age of 14. In re Boynton, 152 Wn.App. 442, 453–57, 216 P.3d 1089 (2009).

Several other crimes are considered "sexually violent" only if proved beyond a reasonable doubt to have been committed with sexual motivation. For these crimes, the instruction defining the crime should be used with WPIC 2.26 (Sexual Motivation—Definition). Applicable crimes are defined in the following instructions: WPIC 26.01 (Murder—First Degree—Definition); WPIC 27.01 (Murder—Second Degree—Intentional—Definition); WPIC 27.03 (Murder—Second Degree—Felony—Definition); WPIC 35.01 (Assault—First Degree—Great Bodily Harm or Deadly Weapon—Definition); WPIC 35.03 (Assault—First Degree—Great Bodily Harm—Definition); WPIC 35.05 (Assault—First Degree—Poison—H.I.V.—Definition); WPIC 35.07 (Assault—First Degree (Alternate Means)—Deadly Weapon or Great Bodily Harm—Definition); WPIC 35.10 (Assault—Second Degree—Definition); WPIC 35.34 (Assault of a Child—First Degree—Definition); WPIC 35.36 (Assault of a Child—Second Degree—Definition); WPIC 39.01 (Kidnapping—First Degree—Definition); WPIC 39.10 (Kidnapping—Second Degree—Definition); WPIC 39.15 (Unlawful Imprisonment—Definition); WPIC 60.01 (Burglary—First Degree—Definition); and WPIC 60.02.01 (Residential Burglary—Definition).

Finally, any attempt, solicitation, or conspiracy to commit one of the crimes listed above constitutes a "sexually violent offense." If there is evidence that the respondent will commit one of these anticipatory offenses, the court should use WPIC 100.01 (Attempt—Definition), WPIC 105.01 (Criminal Solicitation—Definition), or WPIC 110.01 (Criminal Conspiracy—Definition). The definitions of attempt and conspiracy will need to be modified slightly to fit the sexually violent predator proceeding. WPIC 100.01 (Attempt—Definition) would be modified to

read: "A person attempts to commit a crime when . . . ." WPIC 110.01 (Criminal Conspiracy—Definition) would be modified to read: "A person commits the crime of conspiracy to commit an underlying crime when, with intent that conduct constituting the underlying crime be performed, ..."

In addition, this instruction will need to be modified, in relatively rare situations, when the initial commitment was not based on proof of conviction of a qualifying offense of sexual violence.

[Current as of October 2016.]

WPI 365.20

SEXUALLY VIOLENT PREDATORS—CONCLUDING INSTRUCTION

When you begin to deliberate, your first duty is to select a presiding juror. The presiding juror's responsibility is to see that you discuss the issues in this case in an orderly and reasonable manner, that you discuss each issue submitted for your decision fully and fairly, and that each one of you has a chance to be heard on every question before you. Deliberations are to occur only in the jury room when all twelve jurors are present.

You are all officers of the court and must evaluate the evidence with an open mind free of bias or prejudice. If during your deliberations, you become concerned that the discussions are being influenced by preconceived bias or prejudice, you must bring this to the attention of the other jurors so that the issue may be fairly discussed among all members of the jury.

You will be given [the exhibits admitted in evidence,] these instructions[,] and a verdict form, which consists of one question for you to answer. In order to answer the question "yes," the jury must be satisfied beyond a reasonable doubt that "yes" is the correct answer. [Exhibits may have been marked by the court clerk and given a number, but they do not go with you to the jury room during your deliberations unless they have been admitted into evidence. The exhibits that have been admitted will be available to you in the jury room.]

During your deliberations, you may discuss any notes that you have taken during the trial, if you wish. You have been allowed to take notes to assist you in remembering clearly, not to substitute for your memory or the memories or notes of other jurors. Do not assume, however, that your notes are more or less accurate than your memory.

You will need to rely on your notes and memory as to the testimony presented in this case. Testimony will rarely, if ever, be repeated for you during your deliberations.

If, after carefully reviewing the evidence and instructions, you feel a need to ask the court a legal or procedural question that you have been unable to answer, write the question simply and clearly. [For this purpose, use the form provided in the jury room.] In your question, do not state how the jury has voted, or in any other way indicate how your deliberations are proceeding. The presiding juror should sign and date the question and give it to the bailiff. I will confer with the lawyers to determine what response, if any, can be given.

In order to reach a verdict, all jurors must agree. When you have reached a verdict, the presiding juror will fill in and sign the verdict form. The presiding juror will then inform the bailiff that you have reached a verdict. The bailiff will conduct you back into this courtroom where the verdict will be announced.

NOTE ON USE

Use in every case. Use bracketed language as appropriate.

COMMENT

This instruction is modeled after the general concluding instruction for civil cases, as modified to fit SVP commitment cases. See WPI 1.08 (Concluding Instruction—For General Verdict Form).

New to this edition is the second paragraph of the instruction, which encourages all members of the jury to be responsible for ensuring that decisions are made based solely on the evidence and not upon preconceived biases or prejudices. The United State Supreme Court in Peña-Rodriguez v. Colorado, __ U.S. __, 137 S. Ct 855, 869, 197 L.Ed.2d 107 (2017), concluded that the general rule against impeaching a jury verdict must fall when a juror has indicated that he or she relied on racial animus or stereotypes in reaching the verdict. In Turner v. Stime, 153 Wn.App. 581, 222 P.3d 1243 (2009), the court concluded that statements of clear racial bias made by a juror concerning plaintiff's counsel do not "inhere in the verdict" and that it was proper for the trial court to grant a new trial upon proof that such statements were made.

For a discussion of other issues involving both conscious and unconscious bias, see the Comment to WPI 1.01 (Advance Oral Instruction—Beginning of Proceedings).

[Current as of March 2018.]

WPI 365.21

SEXUALLY VIOLENT PREDATORS—INITIAL COMMITMENT—VERDICT FORM

(Insert case caption.)

We, the jury, answer the question submitted by the court as follows:

Has the State proved beyond a reasonable doubt that (name of respondent) **is a sexually violent predator?**

ANSWER: _____ (Write "yes" or "no")

(DIRECTION: Sign this verdict form and notify the bailiff.)

DATE: _____ _____

Presiding Juror

NOTE ON USE

Use this verdict form in every trial for initial commitment. This verdict form should be used with WPI 365.20 (Sexually Violent Predators—Concluding Instruction).

COMMENT

When a civil commitment case is submitted to a jury under RCW 71.09.060(1), the jury must "determine whether, beyond a reasonable doubt, the person is a sexually violent predator." The verdict must be unanimous.

[Current as of October 2016.]

WPI 365.30

SEXUALLY VIOLENT PREDATORS—CONDITIONAL RELEASE (LRA)—UNCONDITIONAL DISCHARGE—ADVANCE ORAL INSTRUCTION—VOIR DIRE

Part 1—Before Prospective Jurors Are Questioned:

In an earlier proceeding, the respondent, (name of respondent), **has been adjudicated to be a sexually violent predator. A sexually violent predator is a person who previously has been convicted of a crime of sexual violence and who suffers from a mental abnormality or personality disorder that makes it likely for the person to engage in predatory acts of sexual violence if not confined in a secure facility.**

You will be receiving specific instructions at the end of the case. I am giving you this preliminary instruction to assist you in answering questions during jury selection, which is sometimes called voir dire.

The purpose of this process is to make sure that we select a jury that is free from any outside or pre-existing bias that might interfere with the jury's ability to fairly decide the case based on the evidence and the law that you receive in this courtroom.

You have already met [Mr.] [Ms. (name)**, our court bailiff. The bailiff's job is to assist you. If there is anything we can do to better accommodate you as a juror, please let the bailiff know. The bailiff will involve me if that is necessary. Please follow any instructions that [he] [she] gives you.**

The court clerk is [Mr.] [Ms. (name)**. The clerk's job is to mark and handle exhibits and other significant papers.**

[The court reporter is [Mr.] [Ms. (name)**. It is the court reporter's job to take verbatim notes of the proceedings.]**

[In this courtroom we record all proceedings with a [video] [audio] recording system. All of the proceedings are preserved to create a "court record."]

(Name of respondent) has been confined at the Special Commitment Center, which is a secure facility. [(Name of respondent) has proposed an alternative placement plan for release to a less restrictive alternative. The State has the burden of proving, in this trial, that this proposed plan is not in (name of respondent's) best interests or that the proposed plan does not include conditions that will adequately protect the community.] [The State has the burden of proving that (name of respondent) continues to meet the definition of a sexually violent predator]. Although this is a civil proceeding, the State must prove its case beyond a reasonable doubt and the jury must be unanimous in its decision.

It is important that you discharge your duties without discrimination, meaning that bias regarding the race, color, religious beliefs, national origin, sexual orientation, gender, or disability of any party, any witnesses, and the lawyers should play no part in the exercise of your judgment throughout the trial. These are called "conscious biases"—and, when answering questions, it is important, even if uncomfortable for you, to share these views with the lawyers.

However, there is another more subtle tendency at work that we must all be aware of. This part of human nature is understandable but must play no role in your service as jurors. In our daily lives, there are many issues that require us to make quick decisions and then move on. In making these daily decisions, we may well rely upon generalities, even what might be called biases or prejudices. That may be appropriate as a coping mechanism in our busy daily lives but bias and prejudice can play no part in any decisions you might make as a juror. Your decisions as jurors must be based solely upon an open-minded, fair consideration of the evidence that comes before you during trial.

In a moment, I am going to ask you some background questions and the lawyers will also have a chance to follow up with some questions of their own. Most importantly, you are to look within yourselves and see if there is anything there in your life experiences or your personal beliefs that might be such a strong influence that it would overcome your ability to serve as a fair and impartial juror. These questions may sometimes involve issues that are sensitive for you. If you are uncomfortable answering any particular question in front of the other jurors, please let me know or notify the bailiff. We may then discuss other ways to handle this question.

Before any questions are asked, an oath or affirmation will be administered. All of your answers must be open, honest, and forthright. At this time, I ask that you please rise, raise your right hand, and [I] [the clerk] will administer this oath.

> "Do you solemnly swear or affirm that you will truthfully answer such questions as may be asked of you by the court or the attorneys concerning your qualifications to act as jurors in this case? [Please respond.]"

The fact that a petition has been filed is not to be considered by you as any indication of the truth of the allegations contained in that petition.

It is your duty as a jury to decide the facts in this case based upon the evidence presented to you during this trial. Evidence is a legal term. Evidence includes such things as testimony of witnesses, documents, or other physical objects.

During your deliberations, you must apply the law to the facts that you find to be true. It is your duty to accept the law from my instructions, regardless of what you personally believe the law is or what you think it ought to

be. You are to apply the law you receive from my instructions to the facts and in this way decide the case.

(The judge explains the procedure for jury selection, and jury selection then begins.)

Part 2—After Jury is Selected:

I will now say a few words about the role and function each of us plays during a jury trial. Jury selection is important but what jurors say in jury selection is not evidence. From this point forward, it is essential that all of your decisions be based upon the evidence and the law that come to you in this courtroom and only in this courtroom.

You must not allow yourself to be exposed to any outside information about this case. Do not permit anyone to discuss or comment about it in your presence, and do not remain within hearing of such conversations. This includes electronic conversations as well as oral ones. You must keep your mind free of outside influences so that your decision will be based entirely on the evidence presented during the trial and on my instructions to you about the law.

Until you are dismissed at the end of this trial, you must avoid outside sources such as newspapers, magazines, blogs, the internet, or radio or television broadcasts which may discuss this case or issues involved in this trial. If you start to hear or read information about anything related to the case, you must act immediately so that you no longer hear or see it. By giving this instruction I do not mean to suggest that this particular case is newsworthy; I give this instruction in every case.

During the trial, do not try to determine on your own what the law is. Do not seek out any evidence on your own. Do not consult dictionaries or other reference materials. Do not conduct any research into the facts, the

issues, or the people involved in this case. This means you may not use [Google or other internet search engines] [internet resources] to look into anything at all related to this case. Do not inspect the scene of any event involved in this case. If your ordinary travel will result in passing or seeing the location of any event involved in this case, do not stop or try to investigate. You must keep your mind clear of anything that is not presented to you in this courtroom.

During the trial, do not provide information about the case to other people, including any of the lawyers, parties, witnesses, your friends, members of your family, or members of the media. If necessary, you may tell people (such as your employer or your child's daycare provider) that you are a juror and let them know when you need to be in court. If people ask you for more details, you should tell them that you are not allowed to talk about the case until it is over.

I want to emphasize that the rules prohibiting discussions include your electronic communications. You must not send or receive information about anything related to the case by any means, including by text messages, email, telephone, internet chat, blogs, or social networking web sites. Do not even mention being on a jury when using social media, such as updating your status on Facebook or sending a message on Twitter. You don't want to do anything that will invite others to talk to you about your jury duty.

In short, do not communicate with anyone, by any means, concerning what you see or hear in the courtroom, and do not try to find out more about anything related to this case, by any means, other than what you learn in the courtroom. These rules ensure that the parties will receive a fair trial. If you have any questions about these restrictions, please contact [the bailiff] [(insert other appropriate staff person)].

If you become exposed to any information other than

what you learn in the courtroom, that could be grounds for a mistrial. A mistrial would mean that all of the work that you and your fellow jurors put into this trial will be wasted. Re-trials are costly and burdensome to the parties and the public. Also, if you communicate with others in violation of my orders, you could be fined or held in contempt of court.

After you have delivered your verdict, you will be free to do any research you choose and to share your experiences with others.

Remember that all phones, laptops, and other communication devices must be turned off while you are in court and while you are in deliberations.

Throughout this trial, you must come and go directly from the jury room. [Follow the bailiff's instructions about where to wait in the courthouse and areas that you should avoid.] Do not remain in the hall or courtroom, as witnesses and parties may not recognize you as a juror, and you may accidentally overhear some discussion about this case. Even a communication about an unrelated topic might give a bad impression to others, therefore I have instructed the lawyers, parties, and witnesses not to greet or talk to you during trial.

I want to comment on one other aspect of your role and that is the importance of keeping an open mind throughout the various stages of these proceedings. The trial has a sensible order to it as each side presents and develops its position.

First: The lawyers will have an opportunity to make opening statements outlining the testimony of witnesses and other evidence that they expect to be presented during trial.

Next: The petitioner will present the testimony of witnesses or other evidence to you. When the petitioner has

finished, the respondent may, but need not, present the testimony of witnesses or other evidence. Each witness may be cross-examined by the other side.

Next: When all of the evidence has been presented to you, I will tell you what law applies to this case. The law that applies will be set out in written instructions, which I will read out loud. You will have [individual copies of] the written instructions with you in the jury room during your deliberations.

Next: The lawyers will make closing arguments.

Finally: You will be taken to the jury room by the bailiff where you will select a presiding juror. The presiding juror will preside over your discussions of the case, which are called deliberations. You will then deliberate in order to reach a decision, which is called a "verdict." During your deliberations, you must apply the law that I provide to you in my instructions to the facts that you find to have been proven.

Until you are in deliberations, you must make sure you are maintaining open minds. If you were to form premature opinions about the case, this would interfere with your ability to get the benefit of each of the subsequent stages.

The attorneys' role is to represent and advocate for the positions of their respective clients. The lawyers' remarks, statements, and arguments are intended to help you understand the evidence and apply the law. However, the lawyers' statements are not evidence or the law. The evidence is the testimony and the exhibits. The law is contained in my instructions. You must disregard anything the lawyers say that is at odds with the evidence or the law in my instructions.

You may hear objections made by the lawyers during trial. Each party has the right to object to questions asked

by another lawyer. These objections should not influence you. Do not make any assumptions or draw any conclusions based on a lawyer's objections.

When there is an objection, it is my job to rule on it. One of my duties as judge is to decide whether or not evidence should be admitted during this trial. What this means is that I must decide whether or not you should consider evidence offered by the parties. For example, if a party offers a photograph as an exhibit, I will decide whether it is admissible. Do not be concerned about the reasons for my rulings. You must not consider or discuss any evidence that I do not admit or that I tell you to disregard.

Our state constitution prohibits a trial judge from making a comment on the evidence. For example, it would be improper for me to express my personal opinion about the value of a particular witness's testimony. Although I will not intentionally do so, if it appears to you that I have indicated my personal opinion concerning any evidence, you must disregard that opinion entirely. The reason for this constitutional rule is that it is solely the role of the jurors to weigh and evaluate the evidence in the case.

[You will be allowed to propose written questions to witnesses after the lawyers have completed their questioning. You may ask questions in order to clarify the testimony, but you are not to express any opinion about the testimony or argue with a witness. If you ask any questions, remember that your role is that of a neutral fact finder, not an advocate.]

[Before I excuse each witness, I will offer you the opportunity to write out a question on a form provided by the court. Do not sign the question. I will review the question to determine if it is legally proper.]

[There are some questions that I will not ask, or will not ask in the wording submitted by the juror. This might

happen either due to the rules of evidence or other legal reasons, or because the question is expected to be answered later in the case. If I do not ask a juror's question, or if I rephrase it, do not attempt to speculate as to the reasons and do not discuss this circumstance with the other jurors.]

[By giving you the opportunity to propose questions, I am not requesting or suggesting that you do so. It will often be the case that a lawyer has not asked a question because it is legally objectionable or because a later witness may be addressing that subject.]

All proceedings in this trial are recorded [by the court reporter] [through electronic means]. Deliberating juries are rarely, if ever, given access to transcripts or recordings of trial testimony. For this reason, you must pay close attention as the testimony is being presented.

The related point is that you are allowed to take notes during trial. I am not instructing you to take notes, nor am I encouraging you to do so. Taking notes may interfere with your ability to listen and observe. If you choose to take notes, I must remind you to listen carefully to all testimony and to carefully observe all witnesses.

At an appropriate time, the bailiff will provide a note pad and a pen or pencil to each of you. Your juror number will be on the front page of the note pad. You must take notes on this pad only, not on any other paper. You must not take your note pad from the courtroom or the jury room for any reason. When you recess during the trial, please (insert appropriate instruction; see Note on Use). **At the end of the day, the note pads must be left** (insert appropriate instruction; see Note on Use). **While you are away from the courtroom or the jury room, no one else will read your notes.**

You must not discuss your notes with anyone or show your notes to anyone until you begin deliberating on your verdict. This includes other jurors. During deliberation,

you may discuss your notes with the other jurors or show your notes to them.

You are not to assume that your notes are necessarily more accurate than your memory. I am allowing you to take notes to assist you in remembering clearly, not to substitute for your memory. You are also not to assume that your notes are more accurate than the memories or notes of the other jurors.

After you have reached a verdict, your notes will be collected and destroyed by the bailiff. No one will be allowed to read them.

Now that you have been empaneled as jurors, you need to take another oath. Please stand and raise your right hand and [I] [the clerk] will administer this oath.

> "Do you solemnly swear or affirm that you will well and truly try this case and render a true verdict based upon the evidence and the law? Please respond."

Having taken your oath as jurors, you are now what the law calls officers of this court. As such, you must not let your emotions overcome your rational thought process. You must decide the case solely on the evidence and the law before you and must not be influenced by any personal likes or dislikes, opinions, prejudices, sympathy, or biases, including unconscious bias. Unconscious biases are stereotypes, attitudes, or preferences that people may consciously reject but may be expressed without conscious awareness, control, or intention. Like conscious bias, unconscious bias, too, can affect how we evaluate information and make decisions.

To assure that all parties receive a fair trial, you must act impartially with an earnest desire to reach a just and proper verdict.

Thank you for your willingness to serve this court and our system of justice.

NOTE ON USE

Use this instruction for trials concerning conditional release (LRA) or unconditional discharge. For trials concerning initial commitment as an SVP, used WPI 365.01 (Sexually Violent Predators—Initial Commitment—Advance Oral Instruction—Voir Dire).

This is not one of the written instructions on the law. Part 1 of this instruction is to be read to the jury panel before jury selection begins. Part 2 is to be read after jury selection has been completed. A decision must be made as to how much of this advance oral instruction, WPI 365.30, is appropriate in a particular case.

In the eighth paragraph, the material in the first set of brackets applies in trials concerning a proposed LRA for conditional release; the material in the second set of brackets applies in trials concerning unconditional discharge.

In the paragraphs addressing juror note-taking, insert an appropriate direction to jurors regarding where to leave their notes during court recesses, such as "leave your notepad on your chair" or "take your note pad with you to the jury room." Also insert an appropriate instruction regarding where jurors are to leave their note pads at the end of the day, such as "in the jury room" or "on your chair."

The instruction's paragraphs about prohibited juror communications and avoiding outside information about the trial are intended for routine cases. For a higher publicity case, the judge should consider expanding on these provisions.

The court may want to remind the jury before each recess to avoid the internet and especially to refrain from conducting internet research. See WPI 6.02 (Before Recesses).

For a discussion of the bracketed paragraphs addressing jurors' questions for witnesses, see the Comment for WPI 365.01 (Sexually Violent Predators—Initial Commitment—Advance Oral Instruction—Voir Dire).

See the Notes on Use for WPI 365.10 (Sexually Violent Predators—Elements for Commitment), WPI 365.31 (Sexually Violent Predators—Conditional Release / Less Restrictive Alternative Placement (LRA)—Elements), and WPI 365.34 (Sexually Violent Predators—Unconditional Discharge Trial—Elements).

COMMENT

This instruction is modeled after the standard advance oral instruction for civil cases, as modified to fit SVP commitment cases. See WPI 1.01 (Advance Oral Instruction—Beginning of Proceedings). This instruction has been revised for this edition.

Unconscious and conscious bias. This instruction incorporates, in several places, new language concerning both unconscious and conscious bias.

In drafting the language on implicit and explicit bias, the WPI Committee carefully reviewed the preliminary oral instructions recently adopted for use in criminal cases in the United States District Court, Western District of Washington. There are slight modifications and additions designed, in part, to avoid the state constitutional provision on commenting on the evidence. Wash. Const. art IV, § 16. The original instructions from the district court are set forth at http://www.wawd.uscourts.gov/jury/unconscious-bias (last visited November 15, 2017).

A trial court is not constitutionally-required to *sua sponte* question potential jurors about potential racial bias or to instruct on such issues. State v. Davis, 141 Wn.2d 798, 826–34, 10 P.3d 977 (2000) (death penalty case). The *Davis* court discussed the possibility of "unnecessarily bringing [issues of race] to the attention of jurors" by such inquiry when not requested by defense counsel. *Davis* relied heavily on jurisprudence from the United States Supreme Court, in particular on the death penalty case of Turner v. Murray, 476 U.S. 28, 106 S.Ct. 1683, 90 L.Ed.2d 27 (1986), and contains a thorough review of federal case law.

The United States Supreme Court in Peña-Rodriguez v. Colorado, ___ U.S. ___, 137 S.Ct. 855, 869, 197 L.Ed.2d 107 (2017), concluded that the general rule against impeaching a jury verdict must fall when a juror has indicated that he or she relied on racial animus or stereotypes in reaching the verdict. In Turner v. Stime, 153 Wn.App. 581, 222 P.3d 1243 (2009), the court concluded that statements of clear racial bias made by a juror concerning plaintiff's counsel do not "inhere in the verdict" and that it was proper for the trial court to grant a new trial upon proof that such statements were made.

The Washington Supreme Court has emphasized the dangers of racial bias impacting the fairness of a trial. For example, in State v. Monday, 171 Wn.2d 667, 257 P.3d 551 (2011), the court unanimously reversed a conviction for prosecutorial misconduct in referring to an "anti-snitch code" allegedly prevalent in the African American community, concluding that when racial bias is shown, it becomes the State's burden to show harmlessness beyond a reasonable doubt. See also City of Seattle v. Erickson, 188 Wn.2d 721, 398 P.3d 1124 (2017)

(when the sole member of a racially cognizable group has been subject to a preemptory challenge by the State, a prima facie case of discriminatory purpose has been established).

Voir Dire. The term voir dire has been replaced by jury selection in several places in the instruction for the purpose of better juror comprehension. No substantive change is intended.

Questioning jurors individually. Although this is more common in criminal cases than in civil, the subject matter of the trial may make it necessary to conduct individual questioning on particularly sensitive or private matters. If a juror expresses discomfort in answering such questions in front of the entire panel or if the court determines that all jurors should be questioned individually given the subject matter, individual questioning can occur. Individual questioning may also be warranted when there is a concern that the panel may be unduly influenced by the answers of other potential jurors or if there has been substantial media interest in the case. However, the courtroom must not be closed to the public unless the *Ishikawa* factors are met and the court's findings included in the record. Seattle Times Co. v. Ishikawa, 97 Wn.2d 30, 640 P.2d 716 (1982). Accord, State v. Bone-Club, 128 Wn.2d 254, 906 P.2d 325 (1995).

Absent *Ishikawa* findings on the record, the courtroom is open during individual questioning of prospective jurors to all members of the public and to the media. It is only the other jurors who are not present for the individual questioning. See State v. Strode, 167 Wn.2d 222, 217 P.3d 310 (2009). It should be noted that when a juror questionnaire is used as part of jury selection, review of the completed questionnaire in chambers, as a general rule, does not violate the clear mandate of the Washington Constitution, Article I, § 10 that "justice in all cases shall be administered openly." State v. Slert, 181 Wn.2d 598, 602–608, 334 P.3d 1088 (2014). Although the Supreme Court in *Slert* reversed the Court of Appeals as to its specific conclusion, the Court of Appeals decision does contain a thorough discussion of the law in this area. State v. Slert, 169 Wn.App. 766, 282 P.3d 101 (2012).

The WPI Committee has bracketed those paragraphs of the advance instruction that deal with jurors proposing questions for witnesses. CR 43(k) as amended in 2002 requires a court to permit jury questions in all civil matters. For a discussion of note-taking in SVP proceedings, see the Comment to WPI 365.01 (Sexually Violent Predators—Initial Commitment—Advance Oral Instruction—Voir Dire).

In some cases, respondent may be seeking unconditional discharge and, in the alternative, release to a less restrictive alternative. If a trial has been granted on both alternatives, this instruction should be modified accordingly.

In addition, if the respondent is not detained in the Special Commitment Center at the time of the current proceeding, the first sentence of the eighth paragraph will also need to be modified. Pursuant to RCW 71.09.020, a secure facility is any facility with "security measures sufficient to protect the community" and may include "total confinement facilities, secure community transition facilities, and any residence used as a court-ordered placement under RCW 71.09.096 [(LRA)]."

The statutory definition of sexually violent predator is contained in RCW 71.09.020.

The statute permits the filing of a petition when the respondent has a prior conviction for a sexually violent offense or for one of a number of enumerated offenses if committed with sexual motivation. The determination that an offense was committed with sexual motivation may be made at either the criminal trial or in the initial commitment proceeding. RCW 71.09.020. In addition, a petition may be filed when the respondent had been charged with a sexually violent offense, which was dismissed because he or she was not competent to stand trial, or when the respondent was found not guilty by reason of insanity for a sexually violent offense. See RCW 71.09.030. The phrase "previously has been convicted of a crime of sexual violence" will need to be modified, in relatively rare situations, when the initial commitment was not based on proof of conviction of a qualifying offense of sexual violence.

[Current as of March 2018.]

WPI 365.31

SEXUALLY VIOLENT PREDATORS—CONDITIONAL RELEASE / LESS RESTRICTIVE ALTERNATIVE PLACEMENT (LRA)—ELEMENTS

To establish that the respondent's proposed less restrictive alternative placement should not be granted, the State must prove one of the following beyond a reasonable doubt:

(1) That the proposed less restrictive alternative placement plan is not in (name of respondent's) **best interests; or**

(2) That the proposed less restrictive alternative placement plan does not include conditions that will adequately protect the community.

[Paragaphs (1) and (2) are alternatives. To answer the question on the special verdict form "yes," you need not be unanimous as to which of these two alternatives has been proved beyond a reasonable doubt, so long as each juror finds that at least one alternative has been proved beyond a reasonable doubt.]

[Paragraphs (1) and (2) are alternatives. The special verdict form has a separate question for each alternative. To answer either question "yes," you must unanimously agree that the alternative identified in that question has been proved beyond a reasonable doubt.]

On the other hand, if after weighing all the evidence, you have a reasonable doubt as to whether the State has met its burden of proof [on a question], then it will be your duty to answer the question "no."

NOTE ON USE

Use this instruction with the following instructions, as appropriate:

WPI 365.02 (Sexually Violent Predators—Conclusion of Trial—Introductory Instruction); WPI 365.30 (Sexually Violent Predators—Conditional Release (LRA)—Unconditional Discharge—Advance Oral Instruction—Voir Dire); WPI 365.03 (Basis of Expert Opinion—Limiting Instruction); WPI 365.04 (Opinion Testimony—Limitation on Consideration of Evidence); WPI 365.33 for defining "reasonable doubt" in a conditional release trial; WPI 365.12 for defining "mental abnormality"; WPI 365.12.01 for defining "personality disorder"; WPI 365.13 for defining "predatory"; WPI 365.14 for defining "likely to engage"; WPI 365.16 for defining "sexual violence"; use WPI 365.20 (Sexually Violent Predators—Concluding Instruction) for the concluding instruction; and WPI 365.37 (Sexually Violent Predators—Verdict Form— Conditional Release—LRA) for the verdict form.

Use the first bracketed paragraph if the court determines that the jury need not be unanimous as to means. Use the second bracketed paragraph if the court determines that the jury must be unanimous as to means. For further discussion, see the Comment below and the Comment to WPI 365.37 (Sexually Violent Predators—Verdict Form—Conditional Release—LRA).

COMMENT

This instruction is based on RCW 71.09.090; RCW 71.09.094; In re Thorell, 149 Wn.2d 724, 744, 751, 759–61; 72 P.3d 708 (2003); In re Jones, 149 Wn.App. 16, 201 P.3d 1066 (2009); In re Reimer, 146 Wn.App. 179, 190 P.3d 74 (2008); In re Bergen, 146 Wn.App. 515, 195 P.3d 529 (2008).

In State v. Halgren, 156 Wn.2d 795, 132 P.3d 714 (2006), the Supreme Court held that a respondent in an initial commitment trial can be committed as a sexually violent predator if the State can establish that the respondent suffers from either a "mental abnormality" or a "personality disorder." Accord, In re Sease, 149 Wn.App. 66, 201 P.3d 1078 (2009). The Supreme Court relied on a line of cases from criminal jurisprudence, which establishes that for alternative means crimes, so long as substantial evidence supports each means, the jury need not unanimously agree as to by which means the offense was committed. See, e.g., State v. Arndt, 87 Wn.2d 374, 553 P.2d 1328 (1976).

The jury should only be instructed on those means for which substantial evidence has been presented. See, e.g., State v. Linehan, 147 Wn.2d 638, 642–43, 56 P.3d 542 (2002).

There have been no appellate cases addressing this issue in the context of an LRA trial. The WPI Committee was split as to whether *Halgren* applies to this statute. Accordingly, the instruction includes two separate bracketed paragraphs; the trial judge may choose between the two paragraphs depending on his or her ruling on *Halgren*.

For futher discussion of the form of an instruction for an "alternative means" case, see WPIC 4.23 (Elements of the Crime—Alternative Elements—Alternative Means for Committing a Single Offense—Form).

[Current as of October 2016.]

WPI 365.32

SEXUALLY VIOLENT PREDATORS—CONDITIONAL RELEASE / LESS RESTRICTIVE ALTERNATIVE PLACEMENT (LRA)—DEFINITION OF "LESS RESTRICTIVE ALTERNATIVE"

A "less restrictive alternative" is release from total confinement under court-ordered conditions, which include supervision and treatment. The proposed less restrictive alternative plan is found in Exhibit ____.

NOTE ON USE

The trial court will make a ruling pretrial or during trial as a matter of law whether respondent's proposed LRA meets the statutory requirements. RCW 71.09.092; RCW 71.09.094.

Use this instruction in every LRA case. See the Note on Use for WPI 365.31 (Sexually Violent Predators—Conditional Release / Less Restrictive Alternative (LRA)—Elements).

COMMENT

See the Comment to WPI 365.31 (Sexually Violent Predators—Conditional Release / Less Restrictive Alternative (LRA)—Elements). The LRA will be given to the jury as an exhibit for their consideration along with the other evidence in the case.

[Current as of October 2016.]

WPI 365.33

SEXUALLY VIOLENT PREDATORS—REASONABLE DOUBT—LESS RESTRICTIVE ALTERNATIVE TRIAL (LRA) / CONDITIONAL RELEASE

The State has the burden of proving beyond a reasonable doubt that the proposed less restrictive alternative placement is either: (1) not in (name of respondent's) **best interests or (2) not adequate to protect the community.** (Name of respondent) **has no burden of establishing that a reasonable doubt exists.**

A reasonable doubt is one for which a reason exists and may arise from the evidence or lack of evidence. It is such a doubt as would exist in the mind of a reasonable person after fully, fairly, and carefully considering all of the evidence or lack of evidence. [If, from such consideration, you have an abiding belief that the proposed less restrictive alternative placement is either not in the respondent's best interests, or not adequate to protect the community, you are satisfied beyond a reasonable doubt.]

NOTE ON USE

The first paragraph of this instruction must be used in every case.

In the second paragraph, the court must decide whether to use the bracketed sentence referring to an abiding belief. For further discussion about the definition of reasonable doubt, see the Comment to WPIC 4.01 (Burden of Proof—Presumption of Innocence—Reasonable Doubt).

COMMENT

The State must prove beyond a reasonable doubt that the respondent should not be released on a proposed less restrictive alternative. RCW 71.09.090.

For further discussion of the burden of proof in a trial proceeding under the SVPA, see Comment to WPI 365.11 (Sexually Violent Predators—Reasonable Doubt—Definition).

[Current as of October 2016.]

WPI 365.34

SEXUALLY VIOLENT PREDATORS—UNCONDITIONAL DISCHARGE TRIAL—ELEMENTS

To establish that (name of respondent) **is a sexually violent predator, the State must prove each of the following elements beyond a reasonable doubt:**

(1) That (name of respondent) **was previously found to be a sexually violent predator;**

(2) That (name of respondent) **continues to suffer from a [mental abnormality] [or] [personality disorder] which causes [him] [her] serious difficulty controlling [his] [her] sexually violent behavior; and**

(3) The [mental abnormality] [or] [personality disorder] continues to make (name of respondent) **likely to commit predatory acts of sexual violence unless confined to a secure facility.**

If you find from the evidence that each of these elements has been proved beyond a reasonable doubt, then it will be your duty to return a verdict that respondent continues to be a sexually violent predator.

On the other hand, if, after weighing all of the evidence, you have a reasonable doubt as to any of one or more of these elements, then it will be your duty to return a verdict that the respondent is no longer a sexually violent predator.

NOTE ON USE

Use this instruction with the following instructions, as appropriate: WPI 365.02 (Sexually Violent Predators—Conclusion of Trial—Introductory Instruction); WPI 365.30 (Sexually Violent Predators—Conditional Release (LRA)—Unconditional Discharge—Advance Oral Instruction—Voir Dire); WPI 365.03 (Basis of Expert Opinion—Limiting Instruction); WPI 365.04 (Opinion Testimony—Limitation on

Consideration of Evidence); WPI 365.35 for defining "reasonable doubt" in an unconditional release trial; WPI 365.12 for defining "mental abnormality"; WPI 365.12.01 for defining "personality disorder"; WPI 365.13 for defining "predatory"; WPI 365.14 for defining "likely to engage"; WPI 365.16 for defining "sexual violence"; WPI 365.20 (Sexually Violent Predators—Concluding Instruction); and WPI 365.36 (Sexually Violent Predators—Verdict Form—Unconditional Discharge).

In elements (2) and (3), use the bracketed "mental abnormality" and/or "personality disorder" language in accord with the evidence presented at trial.

COMMENT

RCW 71.09.090(3)(c) provides as follows:

> If the issue at the hearing is whether the person should be unconditionally discharged, the burden of proof shall be upon the State to prove beyond a reasonable doubt that the committed person's condition remains such that the person continues to meet the definition of a sexually violent predator. Evidence of the prior commitment trial and disposition is admissible. The recommitment proceeding shall otherwise proceed as set forth in RCW 71.09.050 and 71.09.060.

In addition, once a respondent shows cause for a new trial under RCW 71.09.090, the respondent "is entitled to a *full* evidentiary hearing" not limited to the issues presented at the show cause hearing. In re Detention of Elmore, 162 Wn.2d 27, 38–39, 168 P.3d 1285 (2007) (emphasis in original).

[Current as of October 2016.]

WPI 365.35

SEXUALLY VIOLENT PREDATORS—REASONABLE DOUBT—UNCONDITIONAL DISCHARGE TRIAL—DEFINITION

The State has the burden of proving beyond a reasonable doubt that (name of respondent) **continues to meet the definition of a sexually violent predator.** (Name of respondent) **has no burden of establishing that a reasonable doubt exists.**

A reasonable doubt is one for which a reason exists and may arise from the evidence or lack of evidence. It is such a doubt as would exist in the mind of a reasonable person after fully, fairly, and carefully considering all of the evidence or lack of evidence. [If, from such consideration, you have an abiding belief that the respondent continues to meet the definition of a sexually violent predator, you are satisfied beyond a reasonable doubt.]

NOTE ON USE

The first paragraph of this instruction must be used in every case.

In the second paragraph, the court must decide whether to use the bracketed sentence referring to an abiding belief. For further discussion about the definition of reasonable doubt, see the Comment to WPIC 4.01 (Burden of Proof—Presumption of Innocence—Reasonable Doubt).

COMMENT

The State must prove that respondent continues to meet the definition of a sexually violent predator beyond a reasonable doubt. RCW 71.09.090(3).

For further discussion of the burden of proof in a sexually violent predator trial proceeding, see the Comment to WPI 365.11 (Sexually Violent Predators—Reasonable Doubt—Definition).

[Current as of October 2016.]

WPI 365.36

SEXUALLY VIOLENT PREDATORS—VERDICT FORM—UNCONDITIONAL DISCHARGE

(Insert case caption.)

We, the jury, answer the question submitted by the court as follows:

Has the State proved beyond a reasonable doubt that (name of respondent) **continues to be a sexually violent predator?**

ANSWER: _____ *(Write "yes" or "no")*

(DIRECTION: Sign this verdict form and notify the bailiff.)

DATE: _____ _____

Presiding Juror

NOTE ON USE

Use this verdict form in every unconditional discharge trial. This verdict form should be used with WPI 365.20 (Sexually Violent Predators—Concluding Instruction).

COMMENT

In an unconditional discharge case submitted to a jury under RCW 71.09.090(3), the State must "prove beyond a reasonable doubt that the committed person's condition remains such that the person continues to meet the definition of a sexually violent predator."

[Current as of October 2016.]

WPI 365.37

SEXUALLY VIOLENT PREDATORS—VERDICT FORM—CONDITIONAL RELEASE—LRA

(Insert case caption.)

We, the jury, answer the question submitted by the court as follows:

Has the State proved beyond a reasonable doubt that either:

(a) the proposed less restrictive alternative placement plan is not in the best interest of (name of respondent)

or

(b) the proposed less restrictive alternative placement plan does not include conditions that would adequately protect the community?

ANSWER: _____ *(Write "yes" or "no")*

(DIRECTION: Sign this verdict form and notify the bailiff.)

DATE: _____ _____

Presiding Juror

NOTE ON USE

Use this verdict form in every conditional (LRA) release trial. This verdict form should be used with WPI 365.20 (Sexually Violent Predators—Concluding Instruction).

Use this form if the trial judge determines that juror unanimity is not required for individual propositions (a) and (b), i.e., that unanimity is required only for the composite question encompassing those propositions. If, however, the trial judge determines that jurors must be unanimous as to the individual propositions, then the verdict form will need to be modified. See discussion in the Comment.

COMMENT

In an LRA trial, the State must prove at least one of two negative propositions: (a) that the less restrictive alternative plan proposed by the sexually violent predator is not in his or her best interest, or (b) that the plan does not include conditions to adequately protect the community. RCW 71.09.090; WPI 365.31 (Sexually Violent Predators—Conditional Release / Less Restrictive Alternative (LRA)—Elements).

The pattern instruction follows the statutory verdict form set forth in RCW 71.09.094. The Legislature's verdict form presumes that juror unanimity is not required for individual propositions (a) and (b), only for the composite question that encompasses the two propositions. Appellate courts, however, have not yet ruled on how the unanimity requirements apply to LRA release trials. Accordingly, if the judge in a particular case decides that juror unanimity is required for individual propositions, rather than merely for the composite question, then the verdict form would need to be modified to separate the two propositions and to provide for two separate answers. Juror unanimity is also discussed in the Comment to WPI 365.31 (Sexually Violent Predators—Conditional Release / Less Restrictive Alternative (LRA)—Elements). The concluding instruction, WPI 365.20 (Sexually Violent Predators—Concluding Instruction), would also need minor changes.

[Current as of October 2016.]

PART XX

ALCOHOL LIABILITY

CHAPTER 370 LIABILITY FOR FURNISHING ALCOHOL

CHAPTER 370

LIABILITY FOR FURNISHING ALCOHOL

WPI 370.01	Furnishing Alcohol—Person Apparently Under the Influence of Alcohol or Obviously Intoxicated Person—Duty
WPI 370.01.01	Furnishing Alcohol—Person Apparently Under the Influence of Alcohol—Definition
WPI 370.02	Furnishing Alcohol—Obviously Intoxicated Person—Definition
WPI 370.03	Furnishing Alcohol—Person Apparently Under the Influence of Alcohol or Obviously Intoxicated Person—Burden of Proof
WPI 370.04	Furnishing Alcohol—Obviously Intoxicated Person—Assault
WPI 370.05	Furnishing Alcohol—Obviously Intoxicated Person—Assault—Burden of Proof
WPI 370.06	Commercial Vendor—Quasi-Commercial Host—Definitions
WPI 370.07	Furnishing Alcohol to Minors—Duty of Commercial Vendor
WPI 370.08	Furnishing Alcohol to Minors—Commercial Vendor—Burden of Proof
WPI 370.09	Furnishing Alcohol to Minors—Commercial Vendor—Minor Transferee
WPI 370.10	Furnishing Alcohol to Minors—Commercial Vendor—Minor Transferee—Burden of Proof
WPI 370.11	Furnishing Alcohol to Minors—Commercial Vendor—Certification Card Defense
WPI 370.12	Furnishing Alcohol to Minors—Duty of Social Host
WPI 370.13	Furnishing Alcohol to Minors—Social Host—Burden of Proof

---

WPI 370.01

FURNISHING ALCOHOL—PERSON APPARENTLY UNDER THE INFLUENCE OF ALCOHOL OR OBVIOUSLY INTOXICATED PERSON—DUTY

[A [commercial vendor of alcohol] [quasi-commercial host] owes a duty to third persons not to [sell] [serve] [furnish] alcohol to a person who is apparently under the influence of alcohol. [A purely social host, however, owes no such duty.]]

[A [commercial vendor of alcohol] [quasi-commercial host] owes a duty to third persons not to [sell] [serve] [furnish] alcohol to a person who is obviously intoxicated. [A purely social host, however, owes no such duty.]]

NOTE ON USE

Use the applicable paragraph in this instruction for claims that a commercial vendor or quasi-commercial host was negligent in furnishing alcohol to another. The first paragraph uses the "apparently under the influence of alcohol" standard; it is to be used in cases under RCW 66.44.200, such as cases involving injury from a drunk driving accident. The second paragraph uses the "obviously intoxicated" standard; it is to be used in cases for which the statute does not apply, such as cases involving intoxication-related assaults. For further discussion, see the Comment.

Within each paragraph, use bracketed language as applicable.

With this instruction, use either WPI 370.01.01 (Furnishing Alcohol—Person Apparently Under the Influence of Alcohol—Definition) or WPI 370.02 (Furnishing Alcohol—Obviously Intoxicated Person—Definition).

If the person to whom alcohol was furnished was a minor, also use WPI 370.07 (Furnishing Alcohol to Minors—Duty of Commercial Vendor).

For instructions on the burden of proof for claims involving the furnishing of alcohol to obviously intoxicated persons, use either WPI 370.03 (Furnishing Alcohol—Person Apparently Under the Influence of Alcohol or Obviously Intoxicated Person—Burden of Proof), or WPI 370.05 (Furnishing Alcohol—Obviously Intoxicated Person—Assault—Burden of Proof).

If there is an issue whether the defendant was a commercial vendor, a quasi-commercial host, or a purely social host, use WPI 370.06 (Commercial Vendor—Quasi-Commercial Host—Definitions).

COMMENT

Development of standards—Common law—"Obviously intoxicated." Washington has adopted the common law rule that furnishers of alcohol generally are not liable for damages caused by the intoxication of the persons they serve. E.g., Burkhart v. Harrod, 110 Wn.2d 381, 384, 755 P.2d 759 (1988); Halvorson v. Birchfield Boiler, Inc., 76 Wn.2d 759, 762, 458 P.2d 897 (1969). Exceptions to this rule exist when alcohol is furnished to a person who is obviously intoxicated, helpless, or in a special relationship with the furnisher of the alcohol. Burkhart v. Harrod, 110 Wn.2d at 384; Dickinson v. Edwards, 105 Wn.2d 457, 461, 716 P.2d 814 (1986); Young v. Caravan Corp., 99 Wn.2d 655, 658, 663 P.2d 834, amended 672 P.2d 1267 (1983); Wilson v. Steinbach, 98 Wn.2d 434, 438, 656 P.2d 1030 (1982).

Common law—Commercial vendors. Under these common law rules, liability may be imposed on commercial vendors for furnishing alcohol to obviously intoxicated persons. E.g., Purchase v. Meyer, 108 Wn.2d 220, 228–29, 737 P.2d 661 (1987); Young v. Caravan Corp., 99 Wn.2d 655, 658–59, 663 P.2d 834, amended 672 P.2d 1267 (1983). Thus, under Washington common law, a commercial vendor owes a duty not to furnish alcohol to a person who is obviously intoxicated. E.g., Estate of Kelly v. Falin, 127 Wn.2d 31, 37, 896 P.2d 1245 (1995); Christen v. Lee, 113 Wn.2d 479, 488, 780 P.2d 1307 (1989); Dickinson v. Edwards, 105 Wn.2d at 461; Young v. Caravan Corp., 99 Wn.2d at 658.

Under these common law rules, a commercial vendor's duty was consistently described as a duty not to serve alcohol to an "obviously intoxicated" person. E.g., Christen v. Lee, 113 Wn.2d at 488; Purchase v. Meyer, 108 Wn.2d at 225; Wilson v. Steinbach, 98 Wn.2d at 438; Dickerson v. Chadwell, 62 Wn.App. 426, 434, 814 P.2d 687 (1991). Even though RCW 66.44.200 provides that "[n]o person shall sell any liquor to any person *apparently under the influence* of liquor," (emphasis added), the court in *Dickerson* held that it was error to instruct the jury that a commercial vendor had a duty not to serve alcohol to an apparently intoxicated person. Dickerson v. Chadwell, 62 Wn.App. at 435. According to *Dickerson*, the statute and its "apparently under the influence" standard did not alter the well-established common law duty imposed on commercial vendors of alcohol not to serve obviously intoxicated persons.

Recent developments—Statutory standard—"Apparently under the influence." The *Dickerson* approach was rejected by more recent cases from the Washington Supreme Court. In these cases, the

court held that the "apparently under the influence" standard from RCW 66.44.200 has at least partially replaced the common law standard of obvious intoxication. See Faust v. Albertson, 167 Wn.2d 531, 538, 222 P.3d 1208 (2009); Barrett v. Lucky Seven Saloon, 152 Wn.2d 259, 274–75, 96 P.3d 386 (2004); see also Ensley v. Mollman, 155 Wn.App. 744, 230 P.3d 599 (2010).

In *Barrett*, the court held narrowly that the statutory standard replaces the common law standard only for certain categories of cases. The *Barrett* court held that the statutory standard may be used to establish civil liability only if the four-part test from the Restatement (Second) of Torts § 286 (1965) is met. Under the Restatement test, a court analyzes whether the Legislature intended the statute:

> (a) to protect a class of persons which includes the one whose interest is invaded, (b) to protect the particular interest which is invaded, (c) to protect that interest against the kind of harm which has resulted, and (d) to protect that interest against the particular hazard from which the harm results.

Barrett v. Lucky Seven Saloon, 152 Wn.2d 259, 269, 96 P.3d 386 (2004).

The *Barrett* court applied the Restatement test and concluded that the statutory standard applies when a third party plaintiff is injured in an automobile accident caused by a commercial host's alleged overservice of an adult patron. In so holding, the court distinguished first party drunk driving cases and third party assault cases, citing to cases holding that the Restatement test does not generally support application of the statutory standard in these other circumstances. Barrett v. Lucky Seven Saloon, 152 Wn.2d at 270–73. For more detailed analysis of these other circumstances, see the discussion in the Comment's next section.

Thereafter, both *Faust* and *Ensley* cited *Barrett* for the broad proposition that the statutory standard has replaced the common law standard. Neither *Faust* nor *Ensley* limited this proposition to any particular category of cases and neither mentioned the Restatement test. It is thus not entirely clear whether the common law's obvious intoxication standard has been fully replaced, or has merely been replaced to the extent that the statute applies to a given case.

Both *Faust* and *Ensley* were third party drunk driving cases, so the opinions did not require analysis of whether the common law standard had been replaced for other categories of cases. It appears unlikely that the Supreme Court intended for the brief, general statements in *Faust* and *Ensley* to be taken as a silent rejection of *Barrett's* recent analysis of the Restatement test, especially when such a holding would leave courts without any standard to apply to the non-statutory cases. The

WPI Committee thus concludes that the Supreme Court would likely still apply the common law standard to those categories of cases that do not fall under the statutory standard.

Limit on liability—Duty owed only to third parties. The duty of a commercial vendor not to furnish alcohol to an intoxicated adult patron is owed only to innocent bystanders injured or killed by the obviously intoxicated patron; it is not owed to intoxicated adult patrons who are injured due to their own intoxication. Estate of Kelly v. Falin, 127 Wn.2d 31, 37–42, 896 P.2d 1245 (1995). The scope of the duty of a commercial vendor not to furnish alcohol to a minor, whether or not the minor was obviously intoxicated or apparently under the influence of alcohol, is more expansive. See Comment to WPI 370.07 (Furnishing Alcohol to Minors—Duty of Commercial Vendor).

Limit on liability—Assaults. Lawsuits by innocent bystanders against commercial vendors for furnishing alcohol to intoxicated persons most often involve drunk driving accidents, see Estate of Kelly v. Falin, 127 Wn.2d at 37, but liability may also attach in the context of a criminal assault, if the criminal assault was a foreseeable result of furnishing intoxicating liquor to an obviously intoxicated patron. See Christen v. Lee, 113 Wn.2d 479, 491–98,780 P.2d 1307 (1989); Cox v. Keg Restaurants, 86 Wn.App. 239, 247, 935 P.2d 1377 (1997). A criminal assault, however:

> is not a foreseeable result of furnishing intoxicating liquor to an obviously intoxicated person, unless the drinking establishment which furnished the intoxicating liquor had some notice of the possibility of harm from prior actions of the person causing the injury, either on the occasion of the injury, or on previous occasions.

Christen v. Lee, 113 Wn.2d at 498.

Social hosts. Unlike commercial vendors, social hosts are not potentially liable for serving intoxicated adults. The Washington Supreme Court has declined to impose common law liability on purely social hosts. In Burkhart v. Harrod, 110 Wn.2d 381, 388, 390, 755 P.2d 759 (1988), the court held that, absent future legislative action to impose such social host liability, a social host who provides alcohol to an "obviously intoxicated" guest may not be held liable for damages caused by that intoxication. Likewise, social hosts have no liability under the statute, which applies only to the sale of alcohol by commercial vendors. See RCW 66.44.200.

Quasi-commercial hosts. The court has indicated, however, that common law liability for furnishing liquor to obviously intoxicated persons may be imposed on "quasi-commercial hosts, i.e., those who did not sell alcohol, but who otherwise had business interests in furnishing

alcohol to their guests." Burkhart v. Harrod, 110 Wn.2d at 384; see also Fairbanks v. J.B. McLoughlin Co., Inc. 131 Wn.2d 96, 929 P.2d 433 (1997) (banquet-hosting employer may be liable for injuries to third persons proximately caused by intoxication of employee who became intoxicated at the banquet); Dickinson v. Edwards, 105 Wn.2d at 466 (when presence of banquet-hosting employer's management suggested that employer could have ordered service to be denied to intoxicated employee, genuine issue of material fact existed as to whether employer could be held liable to injured third person for furnishing alcohol to obviously intoxicated employee).

The status of common law liability for quasi-commercial hosts is not entirely clear in light of the broad statements in *Faust* and *Ensley* about the common law standard having been replaced by the statutory standard. Also, it appears that RCW 66.44.200 does not apply to quasi-commercial hosts, because the statute applies only to the sale of alcohol, whereas quasi-commercial hosts are by definition those who furnish alcohol free of charge in connection with some other business purpose. See the Comment to WPI 370.06 (Commercial Vendor—Quasi-Commercial Host—Definitions).

[Current as of September 2018.]

WPI 370.01.01

FURNISHING ALCOHOL—PERSON APPARENTLY UNDER THE INFLUENCE OF ALCOHOL—DEFINITION

A person is apparently under the influence of alcohol if that influence is readily perceptible to a reasonable person.

Whether a person is apparently under the influence of alcohol is to be determined by the person's appearance to others at the time the alcohol was [sold] [served] [furnished] to the person. [The appearance of a person a short period of time after the person was [sold] [served] [furnished] alcohol may be considered by you in determining whether the person was [sold] [served] [furnished] alcohol while apparently under the influence of alcohol.]

[Evidence of the amount of alcohol consumed or evidence of blood alcohol content may be considered by you, along with other evidence, in determining whether the person was [sold] [served] [furnished] alcohol while apparently under the influence of alcohol. [However, neither evidence of the amount of alcohol consumed, nor evidence of the person's blood alcohol level, is sufficient by itself to establish that the person was [sold] [served] [furnished] alcohol while apparently under the influence of alcohol.]]

NOTE ON USE

Use this instruction when there is a claim that alcohol was provided to a person apparently under the influence of alcohol. Use bracketed language as applicable.

COMMENT

The instruction's first paragraph is based on Barrett v. Lucky Seven Saloon, 152 Wn.2d 259, 268, 96 P.3d 386 (2004); see also Ensley v. Mollman, 155 Wn.App. 744, 230 P.3d 599 (2010).

In Faust v. Albertson, 143 Wn.App. 272, 178 P.3d 358 (2008),

reversed on other grounds, 167 Wn.2d 531, 222 P.3d 1208 (2009), the Court of Appeals held that "apparently intoxicated" equates to "seemingly drunk," and did not use the "readily perceptible" language from *Barrett*. On appeal, the Washington Supreme Court held circumstantial evidence that a tortfeasor was apparently under the influence post-service may be submitted to the trier of fact when such firsthand observations occur within a short period of time after the alleged overservice. Faust v. Alberston, 167 Wn.2d at 540–41. Further, blood alcohol content of the tortfeasor is relevant to support and corroborate the credibility of firsthand observations of the tortfeasor's appearance, but is not alone sufficient to prove apparent intoxication at the time of service. Faust v. Albertson, 167 Wn.2d at 542.

Additionally, the Washington Supreme Court affirmed the public policy that the standard of proving obvious or apparent intoxication must be based on firsthand observations, not assumptions. Faust v. Albertson, 167 Wn.2d at 539–41. Jurors should not be allowed to infer intoxication based on the tortfeasor's blood alcohol content alone. A person's level of intoxication must be judged at the time of service, because "underlying physiological science reflect[s] that not all drinkers will appear drunk at certain levels of alcohol consumption . . . ." Faust v. Albertson, 167 Wn.2d at 541. See also the Comment to WPI 370.02 (Furnishing Alcohol—Obviously Intoxicated Person—Definition) (discussing requirement that firsthand observations take place within a short period of time after service).

[Current as of September 2018.]

WPI 370.02

FURNISHING ALCOHOL—OBVIOUSLY INTOXICATED PERSON—DEFINITION

A person is obviously intoxicated if the person's appearance and behavior would lead a reasonable observer to conclude that the person is certainly or unmistakably intoxicated. [Intoxication means an alcohol-induced impairment of a person's mental and bodily condition.]

Whether a person was obviously intoxicated or not is to be determined by the person's appearance to others at the time the alcohol was [sold] [served] [furnished] to the person. [The appearance of a person a short period of time after the person was [sold] [served] [furnished] alcohol may be considered by you in determining whether the person was [sold] [served] [furnished] alcohol while obviously intoxicated.]

[Evidence of the amount of alcohol consumed or evidence of blood alcohol content may be considered by you, along with other evidence, in determining whether the person was [sold] [served] [furnished] alcohol while apparently under the influence of alcohol. [However, neither evidence of the amount of alcohol consumed, nor evidence of the person's blood alcohol level, is sufficient by itself to establish that the person was [sold] [served] [furnished] alcohol while obviously intoxicated.]]

NOTE ON USE

Use this instruction when a person's obvious intoxication is in issue. Use bracketed material as applicable.

COMMENT

The first sentence of the paragraph is based on Barrett v. Lucky Seven Saloon, 152 Wn.2d 259, 268, 96 P.3d 386 (2004), in which the Supreme Court held that the term "obviously" intoxicated means "unmistakably" or "certainly" intoxicated. The second sentence is based on State v. Zamora, 6 Wn.App. 130, 132, 491 P.2d 1342 (1971) ("Intoxica-

tion 'refers to an impaired mental and bodily condition which may be produced either by alcohol, which is a drug, or by any other drug.' ") (citing additional cases). The WPI Committee believes that this paragraph more clearly describes the current legal standard than did the previous version, which read: "A person is obviously intoxicated if the person is so intoxicated that he or she is effectively deprived of will power or responsibility for his or her own actions."

> Whether a person is obviously intoxicated or not is to be determined by the person's appearance to others around him or her at the time the intoxicating liquor is furnished to that person. Evidence of the amount of alcohol consumed is not sufficient by itself to establish that a person was furnished intoxicating liquor while obviously intoxicated.

Christen v. Lee, 113 Wn.2d 479, 487, 780 P.2d 1307 (1989). But see Dickinson v. Edwards, 105 Wn.2d 457, 465, 716 P.2d 814 (1986) (admitted fact that the person was served between 15 and 20 drinks in a three and one-half hour period raised a material factual issue as to whether the person would have displayed some outward manifestation of intoxication before ordering and whether defendants knew or should have known that the person was intoxicated) (distinguished as "factually unique" in Purchase v. Meyer, 108 Wn.2d 220, 227, 737 P.2d 661 (1987)).

"[N]either the results of a blood alcohol test nor the appearance of a person a substantial time after the intoxicating liquor was served constitutes sufficient evidence of obvious intoxication." Christen v. Lee, 113 Wn.2d at 488–89; accord, Purchase v. Meyer, 108 Wn.2d at 226; Wilson v. Steinbach, 98 Wn.2d 434, 439, 656 P.2d 1030 (1982); Barrie v. Hosts of America, Inc., 94 Wn.2d 640, 643 n.1, 618 P.2d 96 (1980); Shelby v. Keck, 85 Wn.2d 911, 915, 541 P.2d 365 (1975); Williams v. Kingston Inn, 58 Wn.App. 348, 792 P.2d 1282 (1990).

Although blood alcohol evidence is not sufficient by itself to prove obvious intoxication, the Court of Appeals has held that blood alcohol test results may be admitted under an abuse of discretion standard when the test results enhance the credibility of eyewitnesses who testified as to the person's obvious intoxication. Cox v. Keg Restaurants, 86 Wn.App. 239, 248–50, 935 P.2d 1377 (1997).

The Supreme Court has not yet directly addressed the admissibility of blood alcohol evidence to prove obvious intoxication, see Estate of Kelly v. Falin, 127 Wn.2d 31, 42 n.4, 896 P.2d 1245 (1995), but the rationale of the Supreme Court in several cases suggests that the Supreme Court would reach the same conclusion as the Court of Appeals. See, e.g., Faust v. Albertson, 167 Wn.2d 531, 539–42, 222 P.3d 1208 (2009) (reaching this conclusion in the closely related context of the "apparently under the influence" standard); Christen v. Lee, 113 Wn.2d 479,

780 P.2d 1307 (1989) (a blood alcohol test is not by itself sufficient evidence of obvious intoxication).

A police officer's subjective observation that a person was obviously intoxicated shortly after the person left the place where the person was served alcohol may raise an inference that the person was obviously intoxicated at the time of service, provided that the person did not consume any alcohol after leaving and provided there is no unaccounted-for time between the person's departure and the police officer's subsequent observation. Fairbanks v. J.B. McLoughlin Co. Inc., 131 Wn.2d 96, 103, 929 P.2d 433 (1997); Dickinson v. Edwards, 105 Wn.2d 457, 464, 716 P.2d 814 (1986).

[Current as of September 2018.]

WPI 370.03

FURNISHING ALCOHOL—PERSON APPARENTLY UNDER THE INFLUENCE OF ALCOHOL OR OBVIOUSLY INTOXICATED PERSON—BURDEN OF PROOF

[On (name of plaintiff's) **claim that** (name of defendant) **was negligent in [selling] [serving] [furnishing] alcohol to** (name of person)**,]** (name of plaintiff) **has the burden of proving each of the following propositions:**

(1) That (name of defendant) **was a [commercial vendor of alcohol] [or] [quasi-commercial host];**

(2) That (name of defendant) **[sold] [served] [furnished] alcohol to** (name of person)**;**

(3) That (name of person) **was [apparently under the influence of alcohol] [obviously intoxicated] at the time** (name of defendant) **[sold] [served] [furnished] [him] [her] the alcohol; and**

(4) That the [sale] [service] [furnishing] of alcohol to (name of person) **while [he] [she] was [apparently under the influence of alcohol] [obviously intoxicated] was a proximate cause of** (name of plaintiff or decedent's) **[injury] [death].**

If you find from your consideration of all of the evidence that each of these propositions has been proved, your verdict should be for (name of plaintiff) **[on this claim]. On the other hand, if you find that any of these propositions has not been proved, your verdict should be for** (name of defendant) **[on this claim].**

NOTE ON USE

Use this instruction with WPI 370.01 (Furnishing Alcohol—Person Apparently Under the Influence of Alcohol or Obviously Intoxicated Person—Duty).

Use the bracketed material as applicable. If the furnishing of alcohol to an intoxicated person is the only claim in the case, do not use the bracketed language in the first and last paragraphs.

If the issue in the case involves a criminal assault by an obviously intoxicated patron, use WPI 370.05 (Furnishing Alcohol—Obviously Intoxicated Person—Assault—Burden of Proof), instead of this instruction.

Use WPI 21.01 (Meaning of Burden of Proof—Preponderance of the Evidence) with this instruction.

[Current as of September 2018.]

WPI 370.04

FURNISHING ALCOHOL—OBVIOUSLY INTOXICATED PERSON—ASSAULT

A [commercial vendor of alcohol] [quasi-commercial host] who [sells] [serves] [furnishes] alcohol to a person who is obviously intoxicated is liable to a third person for injuries sustained as a result of an assault committed by the obviously intoxicated person if the [commercial vendor] [quasi-commercial host] had notice, from prior actions of the obviously intoxicated person before or at the time of the [sale] [service] [furnishing], that [he] [she] might engage in violent conduct and harm someone else.

NOTE ON USE

Use this instruction only for cases involving an assault by a patron who was furnished alcohol while obviously intoxicated. Use WPI 370.05 (Furnishing Alcohol—Obviously Intoxicated Person—Assault—Burden of Proof) with this instruction.

COMMENT

See the Comment to WPI 370.05 (Furnishing Alcohol—Obviously Intoxicated Person—Assault—Burden of Proof).

[Current as of September 2018.]

WPI 370.05

FURNISHING ALCOHOL—OBVIOUSLY INTOXICATED PERSON—ASSAULT—BURDEN OF PROOF

[On (name of plaintiff's) **claim that** (name of defendant) **was negligent in [selling] [serving] [furnishing] alcohol to** (name of person)**,]** (name of plaintiff) **has the burden of proving each of the following propositions:**

(1) That (name of defendant) **was a [commercial vendor of alcohol] [or] [quasi-commercial host];**

(2) That (name of defendant) **[sold] [served] [furnished] alcohol to** (name of person)**;**

(3) That (name of person) **was obviously intoxicated at the time** (name of defendant) **[sold] [served] [furnished] [him] [her] the alcohol;**

(4) That (name of defendant)**, at the time it [sold] [served] [furnished] the alcohol, had notice of the possibility of violent conduct and subsequent harm from the actions of** (name of person) **before or at the time of the [sale] [service] [furnishing]; and**

(5) That the [sale] [service] [furnishing] of alcohol to (name of person) **while [he] [she] was obviously intoxicated was a proximate cause of** (name of plaintiff's or decedent's) **[injury] [death].**

If you find from your consideration of all of the evidence that each of these propositions has been proved, your verdict should be for (name of plaintiff) **[on this claim]. On the other hand, if you find that any of these propositions has not been proved, your verdict should be for** (name of defendant) **[on this claim].**

NOTE ON USE

Use this instruction only if the claim of furnishing alcohol to an obviously intoxicated person involves harm from a criminal assault by the intoxicated person. Use WPI 370.01 (Furnishing Alcohol—Person Apparently Under the Influence or Obviously Intoxicated Person—Duty) and WPI 370.04 (Furnishing Alcohol—Obviously Intoxicated Person—Assault) with this instruction.

Use the bracketed language as applicable. If the furnishing of alcohol to an obviously intoxicated person is the only claim in the case, do not use the bracketed language in the first and last paragraphs.

Use WPI 21.01 (Meaning of Burden of Proof—Preponderance of the Evidence) with this instruction.

COMMENT

Pursuant to the analysis in Barrett v. Lucky Seven Saloon, Inc., 152 Wn.2d 259, 96 P.3d 386 (2004), alcohol-related criminal assault cases may still be governed by the common law standard of "obviously intoxicated" rather than by the statutory standard of "apparently under the influence." See further discussion in the Comment to WPI 370.01 (Furnishing Alcohol—Person Apparently Under the Influence or Obviously Intoxicated Person—Duty).

Before liability can be imposed on a commercial vendor for breach of the duty not to serve an obviously intoxicated patron, it must be established that the resulting harm was foreseeable. Christen v. Lee, 113 Wn.2d 479, 492, 780 P.2d 1307 (1989).

> A criminal assault may be a foreseeable result of furnishing intoxicating liquor to an obviously intoxicated person, but only if the drinking establishment which furnished the intoxicating liquor had some notice of the possibility of harm from prior actions of the person causing the injury, either on the occasion of the injury or on previous occasions.

Christen v. Lee, 113 Wn.2d at 491.

A drinking establishment's awareness that a person possesses a knife or other weapon does not by itself provide such notice; there must be some action on the part of that person indicating that he or she may actually use such a weapon. Christen v. Lee, 113 Wn.2d at 491; cf. Cox v. Keg Restaurants, 86 Wn.App. 239, 251, 935 P.2d 1377 (1997) (evidence that person was yelling and banging on the phone approximately 90 minutes before the assault, that person appeared "tipsy," and that person was served three shots of whiskey and three beers after the

manager observed the unruly behavior was sufficient to give rise to an inference that vendor served person while he was obviously intoxicated and had notice of a possibility of harm).

Similar principles apply outside the commercial context. An adult who provides beer for a "kegger" is not liable for harm suffered when juvenile attendees assault another juvenile attendee, unless the assailants give "some notice that they, as individuals, [are] likely to become violent." Cameron v. Murray, 151 Wn.App. 646, 656, 214 P.3d 150 (2009).

Instructions that contain both the "notice of a possibility of harm" and "obviously intoxicated" elements implicitly explain the issue of foreseeability and accurately apprise the jury of the commercial vendor's duty. Cox v. Keg Restaurants, 86 Wn.App. 239, 251–52, 935 P.2d 1377 (1997).

The liability of a drinking establishment for a criminal assault by one of its patrons may involve not only its duty not to serve alcohol to obviously intoxicated persons, but also its duty to properly supervise its premises. See Christen v. Lee, 113 Wn.2d at 497–98, 504–09. For more information concerning this premises duty, see WPI 120.06.03 (Duty to Business Invitee—Protection from Criminal Acts).

[Current as of September 2018.]

WPI 370.06

COMMERCIAL VENDOR—QUASI-COMMERCIAL HOST—DEFINITIONS

[A commercial vendor of alcohol is one who is engaged in the commercial sale of alcohol.]

[A quasi-commercial host is a host who did not sell alcohol, but had a business interest, as opposed to a purely social interest, in furnishing alcohol to [his] [her] [its] guests.]

NOTE ON USE

Use this instruction only if there is a factual issue as to whether the defendant was a commercial vendor, a quasi-commercial host, or a purely social host.

COMMENT

The first bracketed paragraph is drawn from the first element of a burden of proof instruction approved in Cox v. Keg Restaurants, 86 Wn.App. 239, 252 n.6, 935 P.2d 1377 (1997).

The second bracketed paragraph is drawn from Burkhart v. Harrod, 110 Wn.2d 381, 384, 755 P.2d 759 (1988), in which the court distinguished between quasi-commercial hosts and purely social hosts and defined quasi-commercial hosts as "those who did not sell alcohol but who otherwise had business interests in furnishing alcohol to their guests." See also Christen v. Lee, 113 Wn.2d 479, 494, 780 P.2d 1307 (1989).

[Current as of September 2018.]

WPI 370.07

FURNISHING ALCOHOL TO MINORS—DUTY OF COMMERCIAL VENDOR

A commercial vendor of alcohol owes a duty to take reasonable precautions not to [sell] [serve] [furnish] alcohol to a minor. A minor [, for purposes of this instruction,] is a person under the age of twenty-one. [A commercial vendor of alcohol owes this duty to the minor who seeks to obtain the alcohol, to other minors with whom it is foreseeable the minor will share the alcohol, and to third persons who sustain foreseeable alcohol-related injuries as a result of the [sale] [service] [furnishing] of alcohol to the minor or the minor's sharing of it with other minors.]

The duty of a commercial vendor to take reasonable precautions not to furnish alcohol to a minor requires the vendor to check the person's identification, and, if still in doubt about the person's true age, to either refuse to [sell] [serve] [furnish] the person alcohol, or have the person sign a certification card and record an accurate description and serial number of the person's identification on the certification card.

NOTE ON USE

Use this instruction for claims that a commercial vendor of alcohol was negligent in furnishing alcohol to a minor. Use bracketed language as applicable. Use this instruction with WPI 370.08 (Furnishing Alcohol to Minors—Commercial Vendor—Burden of Proof) or WPI 370.10 (Furnishing Alcohol to Minors—Commercial Vendor—Minor Transferee—Burden of Proof). If there is a claim that the minor to whom alcohol was furnished was obviously intoxicated or was apparently under the influence of alcohol, also use WPI 370.01 (Furnishing Alcohol—Person Apparently Under the Influence of Alcohol or Obviously Intoxicated Person—Duty).

If the case involves a transfer of alcohol from a purchasing minor to other minors, also use WPI 370.09 (Furnishing Alcohol to Minors—Commercial Vendor—Minor Transferee) with this instruction. If the

negligence of a minor purchaser for sharing alcohol with other minors is in issue, also use WPI 370.12 (Furnishing Alcohol to Minors—Duty of Social Host).

If contributory negligence of a minor purchaser or a minor transferee is asserted as a defense, use the appropriate instructions contained in WPI Chapter 11 (Contributory Negligence and Imputed Negligence), WPI Chapter 12 (Specific Factors Affecting Negligence and Contributory Negligence), WPI Chapter 16 (Defenses), and/or WPI Chapter 60 (Statutory Violations). If RCW 66.44.210 is asserted as a defense, use WPI 370.11 (Furnishing Alcohol to Minors—Commercial Vendor—Certification Card Defense).

COMMENT

The duty and its source. After Congress repealed Prohibition, the Washington Legislature enacted the Washington Alcoholic Beverage Control Act, also known as the Washington State Liquor Law. Among other things, the Act makes it a crime to sell, give, or otherwise supply alcohol to a minor, i.e., a person under the age of twenty-one. RCW 66.44.270(1); RCW 66.44.310.

Although the Legislature has been silent on the issue of civil liability for furnishing alcohol to minors, Washington courts have held that a commercial vendor of alcohol has a duty to take reasonable precautions not to serve alcohol to a minor and whether the vendor took reasonable precautions to determine the age of its customer is a question of fact. Young v. Caravan Corp., 99 Wn.2d 655, 660–61, 663 P.2d 834 (1983), amended 672 P.2d 1267 (1983); Callan v. O'Neil, 20 Wn.App. 32, 40, 578 P.2d 890 (1978).

Using Restatement (Second) of Torts § 286 (1965), the courts have concluded that the criminal provisions of the Washington State Liquor Law prohibiting vendors from selling or furnishing alcohol to minors creates a standard of care that, when breached, can be considered by the trier of fact as evidence of negligence. Schooley v. Pinch's Deli Market, 134 Wn.2d 468, 473, 951 P.2d 749 (1998); see also Crowe v. Gaston, 134 Wn.2d 509, 951 P.2d 1118 (1998); Purchase v. Meyer, 108 Wn.2d 220, 737 P.2d 661 (1987); Young v. Caravan Corp., 99 Wn.2d 655, 660–61, 663 P.2d 834 (1983), amended 672 P.2d 1267 (1983); Torres v. Salty Sea Days, Inc., 36 Wn.App. 668, 676 P.2d 512 (1984); Callan v. O'Neil, 20 Wn.App. 32, 40, 578 P.2d 890 (1978).

Although some of these cases made reference to negligence per se (e.g., *Purchase*, *Young*, *Callan*, and *Torres*), after the enactment of RCW 5.40.050, the violation of statutes prohibiting the furnishing of alcohol to minors may be considered only as evidence of negligence. Schooley v. Pinch's Deli Market, 134 Wn.2d at 473 n.1.

To whom the duty is owed. To date, Washington courts have found that the following persons have a cause of action in negligence against a commercial vendor who sells or furnishes alcohol to a minor: (1) an injured intoxicated minor purchaser, Young v. Caravan Corp., 99 Wn.2d at 660; (2) third persons injured by the intoxicated minor purchaser, Purchase v. Meyer, 108 Wn.2d at 228; (3) other injured intoxicated minors with whom it was foreseeable the minor purchaser would share the alcohol, Schooley v. Pinch's Deli Market, 134 Wn.2d at 483; and (4) third persons injured by an intoxicated minor with whom the minor purchaser foreseeably shared the alcohol, Crowe v. Gaston, 134 Wn.2d at 516–17.

How the duty is fulfilled. Under RCW 66.20.180, a commercial vendor, in order to determine whether or not a buyer is of legal age to purchase alcohol, may request the buyer to present identification. According to the court in Schooley v. Pinch's Deli Market, 134 Wn.2d 468, 481, 951 P.2d 749 (1998), "all the vendor has to do is ask the purchaser for valid identification in order to verify that he or she is of legal age to purchase alcohol." And, according to the court in Crowe v. Gaston, 134 Wn.2d 509, 518, 951 P.2d 1118 (1998), "[t]he alcohol vendor is simply required to check the buyer's identification."

Under RCW 66.20.190, in addition to checking the buyer's identification, the vendor, if still in doubt about the buyer's true age, shall require the buyer to sign a certification card complying with the statutory requirements, which include recording an accurate description and serial number of the buyer's identification on the certification card. According to the court in Crowe v. Gaston, 134 Wn.2d at 519, "[i]f the vendor completes this step the vendor is immune from any criminal or civil liability regarding the sale of alcohol to the minor." See also Schooley v. Pinch's Deli Market, 134 Wn.2d at 481; RCW 66.20.210.

Limitations on liability. The liability of a commercial vendor for negligently furnishing alcohol to a minor is not limitless. First, the concept of foreseeability determines the scope of the duty owed. Schooley v. Pinch's Deli Market, 134 Wn.2d at 477, 481; Christen v. Lee, 113 Wn.2d 479, 492, 780 P.2d 1307 (1989). Thus, an alcohol vendor will be responsible only for the foreseeable consequences of its negligent sale of alcohol. Schooley v. Pinch's Deli Market, 134 Wn.2d at 481.

Second, "the doctrine of superseding cause serves as a significant limitation on a commercial vendor's liability." Schooley v. Pinch's Deli Market, 134 Wn.2d at 482. Third, because the purchase, possession, or consumption of alcohol by a minor is illegal under RCW 66.44.270(2), when the person injured is an intoxicated minor between the ages of 6 and 20, the violation of the statute may be introduced as evidence of that minor's contributory negligence. Schooley v. Pinch's Deli Market, 134 Wn.2d at 481, 483.

Fourth, "if the minor's intoxication results in that person being more than 50 percent at fault for his or her own injuries, then no recovery is allowed." Schooley v. Pinch's Deli Market, 134 Wn.2d at 481; see also RCW 5.40.060. Fifth, if the vendor has taken the requisite steps to check identification and obtain a signed certification card, the vendor is immunized from all criminal and civil liability. Schooley v. Pinch's Deli Market, 134 Wn.2d at 481; Crowe v. Gaston, 134 Wn.2d at 519; RCW 66.20.210.

[Current as of September 2018.]

WPI 370.08

FURNISHING ALCOHOL TO MINORS—COMMERCIAL VENDOR—BURDEN OF PROOF

[On (name of plaintiff's) **claim that** (name of defendant) **negligently [sold] [served] [furnished] alcohol to** (name of minor)**, a minor,]** (name of plaintiff) **has the burden of proving each of the following propositions:**

(1) That (name of defendant) **was a commercial vendor of alcohol;**

(2) That (name of defendant) **[sold] [served] [furnished] alcohol to** (name of minor)**;**

(3) That (name of defendant) **failed to take reasonable precautions to verify** (name of minor's) **age before [selling] [serving] [furnishing] alcohol to [him] [her]; and**

(4) That the [sale] [service] [furnishing] of alcohol to (name of minor) **was a proximate cause of** (name of plaintiff or decedent's) **[injury] [death].**

If you find from your consideration of all of the evidence that each of these propositions has been proved, your verdict should be for (name of plaintiff) **[on this claim]. On the other hand, if you find that any of these propositions has not been proved, your verdict should be for** (name of defendant) **[on this claim].**

NOTE ON USE

Use this instruction for claims that a commercial vendor negligently furnished alcohol to a minor and proximately caused injury to that minor or to third persons injured by that minor. Use WPI 370.10 (Furnishing Alcohol to Minors—Commercial Vendor—Minor Transferee—Burden of Proof) instead of this instruction if the case involves a claim of injury resulting from a minor purchaser's transfer of alcohol to another minor.

Use this instruction with WPI 370.07 (Furnishing Alcohol to Minors—Duty of Commercial Vendor).

Use the bracketed language as applicable. If the furnishing of alcohol to a minor is the only claim in the case, do not include the bracketed language in the first and last paragraphs.

Use WPI 21.01 (Meaning of Burden of Proof—Preponderance of the Evidence), with this instruction.

COMMENT

For a discussion of issues relating to this instruction, see the Comment to WPI 370.07 (Furnishing Alcohol to Minors—Duty of Commercial Vendor).

[Current as of September 2018.]

WPI 370.09

FURNISHING ALCOHOL TO MINORS—COMMERCIAL VENDOR—MINOR TRANSFEREE

A commercial vendor of alcohol who [sells] [serves] [furnishes] alcohol to a minor is liable to other minors with whom the alcohol was shared, or to third persons who sustain foreseeable alcohol-related injuries as a result of the sharing of the alcohol with other minors, if it was foreseeable that the minor who obtained the alcohol would share it with such other minors.

In determining whether or not it was foreseeable that a minor who obtained alcohol from a commercial vendor would share it with other minors, you may consider the amount and character of the alcohol purchased or furnished, the time of day, the presence of other minors on the premises or in a vehicle, and statements made by the minor who obtained the alcohol, together with any other factors bearing on the question.

NOTE ON USE

Use this instruction if the case involves a minor's transfer of alcohol to another minor and there is an issue as to whether such a transfer was foreseeable.

COMMENT

An alcohol vendor is only responsible for the foreseeable consequences of the vendor's actions. E.g., Schooley v. Pinch's Deli Market, 134 Wn.2d 468, 481, 951 P.2d 749 (1998); Crowe v. Gaston, 134 Wn.2d 509, 516, 951 P.2d 1118 (1998); Burkhart v. Harrod, 110 Wn.2d 381, 395, 755 P.2d 759 (1988). "If a trier of fact could reasonably find it foreseeable that the negligent sale of alcohol to a minor risks exposing other minors to injury, then it may hold the vendor liable for injuries proximately caused by the sale." Rinks v. Bearss, 83 Wn.App. 334, 338, 921 P.2d 558 (1996).

Whether it was foreseeable that a minor who obtained alcohol from a commercial vendor would share the alcohol with other minors, resulting in injury either to such other minors or to third persons, is gener-

ally a question of fact for the jury. Schooley v. Pinch's Deli Market, 134 Wn.2d 468, 477, 951 P.2d 749 (1998); Crowe v. Gaston, 134 Wn.2d 509, 517, 951 P.2d 1118 (1998). In determining whether it was foreseeable, the jury may consider, but is not limited to considering, "the amount and character of the beverages purchased, the time of day, the presence of other minors on the premises or in a vehicle, and statements made by the purchaser." Schooley v. Pinch's Deli Market, 134 Wn.2d at 477–78; see also Crowe v. Gaston, 134 Wn.2d at 517.

[Current as of September 2018.]

WPI 370.10

FURNISHING ALCOHOL TO MINORS—COMMERCIAL VENDOR—MINOR TRANSFEREE—BURDEN OF PROOF

[On (name of plaintiff's) **claim that** (name of defendant) **was negligent in [selling] [serving] [furnishing] alcohol to** (name of minor purchaser)**,]** (name of plaintiff) **has the burden of proving each of the following propositions:**

(1) That (name of defendant) **was a commercial vendor of alcohol;**

(2) That (name of defendant) **[sold] [served] [furnished] alcohol to** (name of minor purchaser)**;**

(3) That (name of defendant) **failed to take reasonable precautions to verify** (name of minor purchaser's) **age before [selling] [serving] [furnishing] alcohol to [him] [her];**

(4) That it was foreseeable that (name of minor purchaser) **would share the alcohol with [**(name of minor transferee)**] [another minor] [other minors]; and**

(5) That the [sale] [service] [furnishing] of alcohol to (name of minor purchaser) **was a proximate cause of** (name of plaintiff or decedent's) **[injury] [death].**

If you find from your consideration of all of the evidence that each of these propositions has been proved, your verdict should be for (name of plaintiff) **[on this claim]. On the other hand, if you find that any of these propositions has not been proved, your verdict should be for** (name of defendant) **[on this claim].**

NOTE ON USE

Use this instruction if the case involves a claim of injury arising from a minor purchaser's transfer of alcohol to another minor. Use WPI

370.07 (Furnishing Alcohol to Minors—Duty of Commercial Vendor) and WPI 370.09 (Furnishing Alcohol To Minors—Commercial Vendor—Minor Transferee) with this instruction.

Use bracketed material as applicable. If the furnishing of alcohol to a minor who shared the alcohol with another minor is the only claim in the case, do not use the bracketed language in the first and last paragraphs.

Use WPI 21.01 (Meaning of Burden of Proof—Preponderance of the Evidence), with this instruction.

[Current as of September 2018.]

WPI 370.11

FURNISHING ALCOHOL TO MINORS—COMMERCIAL VENDOR—CERTIFICATION CARD DEFENSE

It is a complete defense to an action for damages for injuries arising out of a commercial [sale] [service] [furnishing] of alcohol to a minor that the commercial vendor [through its employee(s)] checked the buyer's identification and had the buyer sign a proper certification card.

NOTE ON USE

Use this instruction if there is evidence that the vendor checked the buyer's identification and had the buyer sign a certification card. If there is an issue as to whether the certification card meets the statutory requirements of RCW 66.20.190, an additional instruction setting forth those requirements should be used.

COMMENT

RCW 66.20.210(1) provides that:

> No licensee or the agent or employee of the licensee may be prosecuted criminally or be sued in any civil action for serving liquor to a person under legal age to purchase liquor if such person has presented a card of identification in accordance with RCW 66.20.180, and has signed a certification card as provided in RCW 66.20.190.

If the commercial vendor complies with these steps, but the minor still purchases alcohol, the vendor is immune from civil liability with regard to the sale of alcohol to the minor. Schooley v. Pinch's Deli Market, 134 Wn.2d 468, 481, 951 P.2d 749 (1998); Crowe v. Gaston, 134 Wn.2d 509, 518–19, 951 P.2d 1118 (1998). As the court explained in Schooley v. Pinch's Deli Market, 134 Wn.2d at 481:

> The alcohol vendor . . . has full control at the point of sale. The duty is not onerous, all the vendor has to do is ask the purchaser for valid identification in order to verify that he or she is of legal age to purchase alcohol. See RCW 66.20.180. Moreover, the alcohol vendor has within its own control the power to immunize itself from liability for a minor's alcohol-related conduct. If, after a purchaser presents identification, the vendor still has doubts about the purchaser's age the vendor can fill out and have the purchaser

sign a certification card complying with RCW 66.20.190. If the vendor completes these simple steps, but, nevertheless, the minor purchases alcohol, the vendor is immune from any criminal or civil liability regarding the sale of alcohol to the minor.

Under RCW 66.20.190, a certification card should be a five-inch by eight-inch card containing in bold-face type a statement that "the signer understands that conviction for unlawful purchase of alcoholic beverages or misuse of the certification card may result in criminal penalties including imprisonment or fine or both." An accurate description and serial number of the identification presented by the signer should be recorded on the certification card.

[Current as of September 2018.]

WPI 370.12

FURNISHING ALCOHOL TO MINORS—DUTY OF SOCIAL HOST

A social host owes a duty to exercise reasonable care not to furnish alcohol to a minor. A minor [, for purposes of this instruction,] is a person under the age of twenty-one. [A social host owes this duty only to the minor to whom [it] [he] [she] furnished alcohol.]

NOTE ON USE

Use this instruction for claims that a social host negligently furnished alcohol to a minor. Use bracketed language as applicable. Use WPI 370.13 (Furnishing Alcohol to Minors—Social Host—Burden of Proof) with this instruction.

If contributory negligence of the minor is asserted as a defense, use the appropriate instructions contained in WPI Chapter 11 (Contributory Negligence and Imputed Negligence), WPI Chapter 12 (Specific Factors Affecting Negligence and Contributory Negligence), WPI Chapter 16 (Defenses), and/or WPI Chapter 60 (Statutory Violations).

COMMENT

Under RCW 66.44.270(1), it is a criminal act for any person, including a social host, to furnish liquor to a minor, i.e., a person under the age of twenty-one. The statute does not apply, however, to liquor given by the minor's parent or guardian, liquor given for medicinal purposes by a parent, guardian, physician or dentist, minimal amounts of liquor given in connection with religious services, or liquor provided to a student in accordance with a special permit issued under RCW 66.20.010 (12).

The duty and its source. Based upon RCW 66.44.270(1), the Washington Supreme Court has held that "social hosts owe a duty to exercise ordinary care not to furnish liquor to a minor." Hansen v. Friend, 118 Wn.2d 476, 485, 824 P.2d 483 (1992). Since the enactment of RCW 5.40.050, breach of this statutory duty is not negligence per se, but may be considered as evidence of negligence. Hansen v. Friend, 118 Wn.2d at 483. Thus, the trier of fact may find a social host's statutory violation is not negligence, for example, "where the violation is due to some cause beyond the violator's control, and ordinary care could not have guarded against the violation." Hansen v. Friend, 118 Wn.2d at 483.

Although RCW 66.44.270(1) also makes it a criminal act for any person to "permit [a minor] to consume liquor on his or her premises or on any premises under his or her control," Washington courts have declined to extend the social host's common law duty of reasonable care beyond the duty announced in *Hansen*, i.e., the duty to exercise reasonable care not to furnish alcohol to a minor. Estate of Templeton v. Daffern, 98 Wn.App. 677, 990 P.2d 968 (2000). As the court explained in *Templeton*:

> Although the host owes a common law duty of reasonable care to a minor whom the host has knowingly furnished with alcohol, the social host does not owe a common law duty of reasonable care to a minor whom the host has not furnished with alcohol, even if the host permits the minor to consume, on the host's premises, alcohol that the minor obtained elsewhere.

Estate of Templeton v. Daffern, 98 Wn.App. at 690.

A social host who furnishes alcohol to a minor is not liable to the same extent as a commercial vendor. A landowner who does not know his property is being used for keg parties is not liable to a third person for injuries caused by a drunken attendee. Baynes v. Rustler's Gulch Syndicate, 142 Wn.App. 335, 173 P.3d 1000 (2007). The social host owes a duty of care only to the minor to whom the alcohol was furnished, and not to third persons. See, e.g., Reynolds v. Hicks, 134 Wn.2d 491, 496–502, 951 P.2d 761 (1998); Crowe v. Gaston, 134 Wn.2d 509, 520–22, 951 P.2d 1118 (1998); Mills v. Estate of Schwartz, 44 Wn.App. 578, 584–86, 722 P.2d 1363 (1986).

Public policy. The Washington Supreme Court has found there is good reason not to apply common law liability to social hosts as it is applied to commercial and quasi-commercial hosts. "Social hosts are not as capable of handling the responsibilities of monitoring their guests' alcohol consumption as are their commercial and quasi-commercial counterparts . . . ." Reynolds v. Hicks, 134 Wn.2d at 497 (quoting Burkhart v. Harrod, 110 Wn.2d 381, 386–387, 755 P.2d 759 (1988)). Further, the Washington Supreme Court has held that RCW 66.44.270(1) was enacted to protect minors from injuries resulting from their own abuse of alcohol, not to protect third parties injured by intoxicated minors. Reynolds v. Hicks, 134 Wn.2d at 498–501; Crowe v. Gaston, 134 Wn.2d at 521.

Limitations of liability. The liability of a social host to a minor to whom the social host has negligently furnished alcohol is not limitless. First, the concept of foreseeability determines the scope of the duty owed. Hansen v. Friend, 118 Wn.2d 476, 483, 824 P.2d 483; Christen v. Lee, 113 Wn.2d 479, 492, 780 P.2d 1307 (1989). Thus, "the harm sustained must be reasonably perceived as being within the general

field of danger covered by the specific duty owed by the defendant." Hansen v. Friend, 118 Wn.2d at 484 (quoting Christen v. Lee, 113 Wn.2d at 492).

Second, because the purchase, possession, or consumption of alcohol by a minor is illegal under RCW 66.44.270(2), when the person injured is an intoxicated minor under the age of 21, the violation of the statute may be introduced as evidence of that minor's contributory negligence. Schooley v. Pinch's Deli Market, 134 Wn.2d 468, 481, 483, 951 P.2d 749 (1998); Hansen v. Friend, 118 Wn.2d at 484.

Third, "if the minor's intoxication results in that person being more than 50 percent at fault for his or her own injuries, then no recovery is allowed." Schooley v. Pinch's Deli Market, 134 Wn.2d at 481; RCW 5.40.060. RCW 5.40.060 provides a complete defense to an action for damages for personal injury or wrongful death if the person injured or killed was under the influence of intoxicating liquor at the time of the occurrence causing the injury or death and that such condition was a proximate cause of the injury or death and the trier of fact finds such person to be more than fifty percent at fault. Hansen v. Friend, 118 Wn.2d at 484; see WPI 16.03 (Intoxication of Person Injured or Killed—Defense).

[Current as of September 2018.]

WPI 370.13

FURNISHING ALCOHOL TO MINORS—SOCIAL HOST—BURDEN OF PROOF

[On (name of plaintiff's) **claim that** (name of defendant)**, a social host, negligently furnished alcohol to** (name of minor)**,]** (name of plaintiff) **has the burden of proving each of the following propositions:**

(1) That (name of defendant) **furnished alcohol to** (name of minor)**;**

(2) That (name of defendant) **failed to exercise reasonable care not to furnish alcohol to minors when it furnished alcohol to** (name of minor)**; and**

(3) That the furnishing of alcohol to (name of minor) **proximately caused** (name of minor's) **[injury] [death].**

If you find from your consideration of all of the evidence that each of these propositions has been proved, your verdict should be for (name of plaintiff) **[on this claim]. On the other hand, if you find that any of these propositions has not been proved, then your verdict should be for** (name of defendant) **[on this claim].**

NOTE ON USE

Use this instruction for claims that a social host negligently furnished alcohol to a minor. Use WPI 370.12 (Furnishing Alcohol to Minors—Duty of Social Host) with this instruction.

Use WPI 21.01 (Meaning of Burden of Proof—Preponderance of the Evidence) with this instruction.

Use bracketed language as applicable. If the furnishing of alcohol to a minor by a social host is the only claim in the case, do not use the bracketed language in the first and last paragraphs.

[Current as of September 2018.]

PART XXI

NUISANCE

CHAPTER 380 NUISANCE

CHAPTER 380

NUISANCE

WPI 380.00	Introduction
WPI 380.01	Nuisance in General—Definition
WPI 380.01.01	Nuisance—Example of Modified Definition—Interference With Use of Street or Highway
WPI 380.02	Public/Private Nuisance—Definition
WPI 380.03	Nuisance—Balancing Test
WPI 380.04	Nuisance Per Se
WPI 380.05	Nuisance—Burden of Proof—No Affirmative Defense
WPI 380.06	Nuisance—Burden of Proof—Assumption of Risk Defense (Coming to the Nuisance)

WPI 380.00

INTRODUCTION

This chapter sets forth pattern instructions for some common nuisance issues.

Overview of the law. State law nuisance claims are based on specific statutory provisions and the common law. Tiegs v. Watts, 135 Wn.2d 1, 14, 954 P.2d 877 (1998). Nuisance claims may be brought either by public entities to abate public nuisances or by private individuals for damages and abatement of public or private nuisances. RCW 7.48.020; RCW 4.48.210; RCW 7.48.220. Nuisance law is codified at the state level in RCW Chapter 7.48. According to RCW 7.48.010, nuisance is actionable for: "whatever is injurious to health or indecent or offensive to the senses, or an obstruction to the free use of property, so as to essentially interfere with the comfortable enjoyment of . . . life and property."

The Legislature broadly defined nuisance as "unlawfully doing an act, or omitting to perform a duty, which act or omission either annoys, injures or endangers the comfort, repose, health or safety of others . . . or in any way renders other persons insecure in life, or in the use of property." RCW 7.48.120. This general definition is set forth in WPI 380.01, which sets forth the statutory definition in an easy to read format. For a clear statement of the elements and nature of a nuisance action, see Grundy v. Thurston County, 155 Wn.2d 1, 6–7, 117 P.3d 1089 (2005).

Other sections of RCW Chapter 7.48 offer more specific examples of nuisances. RCW 7.48.140 prohibits certain public nuisances. Other state and local provisions may also form the basis of a nuisance claim. Kitsap County v. Kev, Inc., 106 Wn.2d 135, 138, 720 P.2d 818 (1986). State, county, and municipal codes are possible sources for legal authority regarding a claim of nuisance. See King County ex rel. Sowers v. Chisman, 33 Wn.App. 809, 658 P.2d 1256 (1983). See, e.g., Pierce County Code 8.08.010 (nuisances affecting public health); King County Code 23.02; State Shoreline Management Act, RCW Chapter 90.58; Uniform Building Code, RCW 19.27.031; RCW 9.66.010 (criminal code statement of public nuisance).

Even an otherwise legal use of one's property that unreasonably interferes with a neighbor's use and enjoyment of his/her property may be a nuisance. MJD Properties, LLC v. Haley, 189 Wn.App. 963, 358 P.3d 476 (2015) (a driveway light unnecessarily shining in a neighbor's bedroom window, or a "spite tree" planted to obstruct the view may constitute a nuisance). Determining whether activity is a nuisance requires balancing "the rights, interests and convenience" unique to the case. Where a nuisance exists, it is not excused by the otherwise lawful quality of the business. MJD Properties, LLC v. Haley, 189 Wn.App. 963 (fact outdoor light complies with city code does not mean it cannot be a nuisance.)

RCW Chapter 7.48 draws a distinction between public nuisances and private nuisance. A public nuisance is a nuisance that "affects equally the rights of an entire community or neighborhood, although the extent of the damage may be unequal." See, e.g., Kitsap County v. Kitsap Rifle and Revolver Club, 184 Wn.App. 252, 286–87, 337 P.3d 328 (2014), review denied 183 Wn.2d 1008 (2015) (finding a public nuisance where noise affected neighborhood even where some individuals within the neighborhood were not bothered). A public nuisance action may be maintained by a government entity or may be brought by a private person if the person is specifically injured by the nuisance activity. RCW 7.48.210. See e.g., Miotke v. City of Spokane, 101 Wn.2d 307, 331–32, 678 P.2d 803 (1984), abrogated on other grounds by Blue Sky Advocates v. State, 107 Wn.2d 112, 727 P.2d 644 (1986) (private waterfront residents allowed to maintain a public nuisance action for sewage bypass into lake because, while the entire community was impacted by

the sewage, the waterfront residents' injuries were greater than those suffered by the general public).

Statutes on farms and forests. The Right to Farm Act, RCW 7.48.300 to.310, protects farm and forest owners from nuisance lawsuits in urbanizing areas. Alpental Community Club v. Seattle Gymnastics Soc., 154 Wn.2d 313, 317–23, 111 P.3d 257 (2005) (forestry); Buchanan v. Simplot Feeders, Ltd. Partnership, 134 Wn.2d 673, 680, 952 P.2d 610 (1998) (farming). The Right to Farm Act creates a statutory immunity and codifies the affirmative defense of coming to the nuisance.

If plaintiff and defendant are neighbors who each own rural property, and both parties have put their property to rural use, then defendant cannot rely on the Right to Farm Act. Buchanan v. Simplot Feeders, Ltd., 134 Wn.2d at 684 (cattle ranch and stockyard-owner defendant could not rely on Right to Farm Act, when plaintiff—owner of a neighboring farm—sued for nuisance; both parties were rural; the flies and manure from defendant's cattle ranch were causing a nuisance by harming plaintiff's crops; the court held that Right to Farm Act did not apply, because legislative intent of Right to Farm Act is to prevent rural farmers and forest owners from having to defend against lawsuits brought by landowners that can be classified as urbanizing plaintiffs; if both parties are engaged in rural practices, then Right to Farm Act does not shield the defendant).

To qualify for statutory protection, the agricultural or forest practice must meet three conditions: (1) the farming or forestry activity is consistent with good practices; (2) the farming or forestry activity was established before the surrounding non-agricultural or non-forestry activity; and (3) the farming or forestry activity does not have a "substantial adverse effect on public health and safety." See Davis v. Taylor, 132 Wn.App. 515, 132 P.3d 783 (2006) (farm owners used loud propane cannons and cherry guns, day and night, to scare birds away from cherry trees; plaintiffs, who owned a home in a nearby housing development, sued to enjoin the noise as a nuisance; the court held that Right to Farm Act did not provide farm owners with immunity from nuisance lawsuit, because the farmers grew only apple trees before the housing development began; cherry trees, and the noisy cannons and guns used to protect the cherries, did not qualify as pre-existing agricultural activities); Vicwood Meridian P'ship v. Skagit Sand & Gravel, 123 Wn.App. 877, 882–887, 98 P.3d 1277 (2004) (foul-smelling composting facility, used in mushroom farming business, qualified for statutory immunity and coming to the nuisance affirmative defense, because compost is necessary for mushroom farming).

Nuisance claim distinguished from negligence. Practitioners should be aware that a nuisance claim that is simply a restated negligence claim need not be the subject of a separate instruction on

nuisance. A party's characterization of the theory of recovery is also not binding upon the court. It is the nature of the claim that controls. Accordingly, the trial court's refusal to give a proposed instruction on nuisance that was based upon the same omission to perform a duty that was alleged to constitute negligence has been held to be proper under Washington law. See, e.g., Atherton Condominium Apartment-Owners Ass'n Bd. of Directors v. Blume Development Co., 115 Wn.2d 506, 527, 799 P.2d 250 (1990); Kaech v. Lewis County Pub. Util. Dist., 106 Wn.App. 260, 23 P.3d 529 (2001); cf. Albin v. National Bank of Commerce, 60 Wn.2d 745, 753, 375 P.2d 487 (1962).

Overview of instructions. The pattern instructions include some common examples of nuisance. WPI 380.01.01 (Nuisance—Example of Modified Definition—Interference With Use of Street or Highway) sets out a pattern instruction regarding an obstruction of a street or highway. Each law of the state, county, or city will have unique language; the jury instructions defining nuisance and describing the burden of proof will need to be tailored to fit the statutory framework.

The statutory definition of a public nuisance is set forth in WPI 380.02. For cases in which the public nuisance action is being brought by a private individual, the jury will need this definition to determine if the private individual may recover. RCW 7.48.210; Hostetler v. Ward, 41 Wn.App. 343, 704 P.2d 1193 (1985).

Other situations will require that the jury balance the rights, interests, and convenience of the defendant against those of the plaintiff. WPI 380.03 explains this balancing test.

Conduct or activity on property that violates specific statutes may be a nuisance per se. WPI 380.04 addresses these situations. However, the failure to obtain required permits does not turn the activity into a nuisance per se. Moore v. Steve's Outboard Service, 182 Wn.2d 151, 339 P.3d 169 (2014).

Two burden of proof instructions are offered, one for the plaintiff's case (WPI 380.05) and one for the affirmative defense of assumption of risk (coming to the nuisance, WPI 380.06).

[Current as of September 2016.]

WPI 380.01

NUISANCE IN GENERAL—DEFINITION

Nuisance is unlawfully doing an act or failing to perform a duty, which act or failure to act:

[(1)] [Annoys, injures, or endangers the comfort, repose, health, or safety of others] [or]

[(2)] [Offends decency] [or]

[(3)] [Unlawfully interferes with, obstructs or tends to obstruct, or renders dangerous for passage, any lake, navigable river, bay, stream, canal, or basin] [or]

[(4)] [Unlawfully interferes with, obstructs or tends to obstruct, or renders dangerous for passage any public park, square, street, or highway] [or]

[(5)] [In any way renders other persons insecure in life, or in the use of property].

NOTE ON USE

This instruction defines nuisance generally. Select the bracketed paragraphs that are appropriate to the case and renumber accordingly. Use this instruction along with the balancing test instruction (WPI 380.03) when the case does not involve nuisance per se. Use this instruction along with WPI 380.06 (Nuisance—Burden of Proof—Assumption of Risk Defense (Coming to the Nuisance)) for cases in which the defendant uses the affirmative defense of "coming to the nuisance."

Alternatively, the jury may be instructed using a definition derived from more specific statutes or ordinances. See the Comment below.

COMMENT

This instruction is based on RCW 7.48.120. The Supreme Court approved a similar instruction in Tiegs v. Watts, 135 Wn.2d 1, 10, 15, 954 P.2d 877 (1998). Elements of a nuisance action are set forth in Grundy v. Thurston County, 155 Wn.2d 1, 6–7, 117 P.3d 1089 (2005); MJD v. Haley, 189 Wn.App. 963, 358 P.3d 476 (2015) (spite tree and garage driveway light).

Definitions of nuisance may be found in sources other than RCW 7.48.120, including other statutes and local ordinances. See, e.g., RCW 7.48.140. An ordinance may characterize an activity as a nuisance, but only if "it is in fact a nuisance." Kitsap County v. Kev, Inc., 106 Wn.2d 135, 138, 720 P.2d 818 (1986). Under certain conditions, it may be permissible to use nuisance per se and strict liability to bypass the balancing test in a public nuisance action brought by a public entity; under other conditions it may be unconstitutional to remove the balancing test from the elements of proof. See City of Woodinville v. Northshore United Church of Christ, 166 Wn.2d 633, 638, 641–47, 211 P.3d 406 (2009) (city violated church's right to freedom of religion under Article 1, Section 11 of the Washington State Constitution, by issuing a moratorium that was not narrowly drawn, by refusing to consider the church's permit application, and by violating the contract).

Depending on the facts of the case, instructing the jury using one of these other definitions may be appropriate. For an example of how to draft a definition that is based on violations of other statutes, see WPI 380.01.01 (Nuisance—Example of Modified Definition—Interference with Use of Street or Highway). For other examples of nuisance per se based on statutes and regulations, refer to the Comment to WPI 380.04.

[Current as of September 2016.]

WPI 380.01.01

NUISANCE—EXAMPLE OF MODIFIED DEFINITION—INTERFERENCE WITH USE OF STREET OR HIGHWAY

Nuisance is unlawfully doing an act, or failing to perform a duty, that [makes any street or highway dangerous for passage] [or] [obstructs or tends to obstruct any street or highway] [or] [constitutes a hazard to vehicles or persons traveling on any street or highway].

NOTE ON USE

Use this instruction, instead of WPI 380.01 (Nuisance in General—Definition), to define nuisance when the primary issue of nuisance concerns obstruction of a street or highway or a dangerous condition thereon.

COMMENT

The general definition of nuisance is found in WPI 380.01 (based on RCW 7.48.120). In some cases, however, sources of law other than RCW 7.48.120 may exist that furnish more specific definitions of nuisance. See the Comment to WPI 380.01 (Nuisance in General—Definition). The instruction above is an example of how to incorporate language from other applicable sources of law to define nuisance more specifically to fit the facts of a particular case.

The first bracketed clause of this instruction is based upon RCW 7.48.120, which provides in relevant part: "Nuisance consists in unlawfully doing an act, or omitting to perform a duty, which act or omission . . . render[s] dangerous for passage . . . any . . . street or highway." This is an example of a specific statutory nuisance. Other examples may be found in RCW 7.48.010, 7.48.120, and 7.48.140.

The second and third bracketed clauses of this instruction are based upon RCW 7.48.010 and RCW 47.32.130. RCW 7.48.010 provides that the obstruction of any highway is a nuisance and the subject of an action for damages and other relief. RCW 47.32.130 declares that the existence of:

> any structure, device, or natural or artificial thing that threatens or endangers the state highway or a portion thereof, or that tends to endanger persons traveling thereon, or obstructs or tends to obstruct or constitutes a hazard to vehicles or persons traveling thereon, the structure, device, or natural or artificial thing is declared to be a public nuisance . . ."

Constructing a fence on an easement in violation of the county code is a nuisance per se. Littlefair v. Schulze, 169 Wn.App. 659, 278 P.3d 218 (2012).

[Current as of September 2016.]

WPI 380.02

PUBLIC/PRIVATE NUISANCE—DEFINITION

A public nuisance is one that affects equally the rights of an entire community or neighborhood, although the extent of the damage may be unequal. Every other nuisance is a private nuisance.

NOTE ON USE

Use this instruction when a private person brings an action for public nuisance.

COMMENT

This instruction incorporates the language of RCW 7.48.130 and 7.48.150, which define public and private nuisance. RCW 7.48.140 lists specific examples of public nuisances, e.g., depositing an animal carcass in a public area, obstructing a river or public highway, manufacturing gun powder, establishing powder magazines, creating obnoxious exhalations or smells, and selling intoxicating liquors in inappropriate areas.

Noise from a shooting range that affected the entire neighborhood was a public nuisance even though some individuals within the neighborhood were not bothered. Kitsap County v. Kitsap Rifle and Revolver Club, 184 Wn.App. 252, 286–87, 337 P.3d 328 (2014).

Private parties must meet the threshold requirement of RCW 7.48.210 in order to maintain an action for public nuisance: "A private person may maintain a civil action for a public nuisance, if it is specifically injurious to himself or herself but not otherwise." RCW 7.48.210; Hostetler v. Ward, 41 Wn.App. 343, 356–57, 704 P.2d 1193 (1985). See also State v. Grant, 156 Wash. 96, 286 P. 63 (1930); In re Hanford Nuclear Reservation Litig., 780 F.Supp. 1551, 1576 (E.D. Wash. 1991) (applying *Grant*).

[Current as of September 2016.]

WPI 380.03

NUISANCE—BALANCING TEST

In determining whether the defendant has caused a nuisance, you must balance the rights, interests, and convenience of the defendant against the rights, interests, and convenience of the plaintiff. The inconvenience, discomfort, or interference that the plaintiff suffers must be measured according to what a person of ordinary and normal sensibilities would suffer.

There is no precise measure of the amount of discomfort that an act must produce in order to constitute a nuisance. Rather, the fundamental inquiry is whether the use to which the property is put is reasonable or unreasonable. An otherwise lawful action may still be a nuisance if it is an unreasonable use of property. In determining what is the reasonable use of the property, you must consider all of the surrounding facts and circumstances, including the character of the neighborhood, the social utility of the activity, manner of use, and circumstances of the activity.

NOTE ON USE

Use this instruction with WPI 380.01 (Nuisance In General—Definition). If there is an affirmative defense of "coming to the nuisance," use this instruction with WPI 380.06 (Nuisance—Burden of Proof—Assumption of Risk Defense (Coming to the Nuisance)). This instruction should be used only for nuisances that require a balancing test. For cases of nuisance per se, use WPI 380.04 instead of this instruction.

COMMENT

The language of this instruction is taken substantially from Morin v. Johnson, 49 Wn.2d 275, 300 P.2d 569 (1956), and Riblet v. Spokane-Portland Cement Co., 41 Wn.2d 249, 248 P.2d 380 (1952), overruled on other grounds in Bradley v. American Smelting and Refining Co., 104 Wn.2d 677, 709 P.2d 782 (1985); Bradley v. American Smelting and Refining Co., 104 Wn.2d 677, 709 P.2d 782 (1985). See also Lakey v. Puget Sound Energy, Inc., 176 Wn.2d 909, 923, 296 P.3d 860 (2013); MJD v. Haley, 189 Wn.App. 963, 358 P.3d 476 (2015).

Several recent cases have addressed the balancing test in the context of summary judgment. The social utility of the challenged activity is a factor considered in Lakey v. Puget Sound Energy, Inc., 176 Wn.2d 909, 923, 296 P.3d 860 (2013) (power production plant) and Kitsap County v. Kitsap Rifle and Revolver Club, 184 Wn.App. 252, 286–87, 337 P.3d 328 (2014), review denied 183 Wn.2d 1008 (2015) (a shooting range). Social utility requires evaluation of the character of the neighborhood where the activity occurs and the degree of community dependence on the particular activity. Lakey v. Puget Sound Energy, Inc., 176 Wn.2d at 923; Grundy v. Thurston County, 155 Wn.2d 1, 7 n.5, 117 P.3d 1089 (2005); Highline School Dist., No. 401 v. Port of Seattle, 87 Wn.2d 6, 17 n.7, 548 P.2d 1085 (1976).

[Current as of September 2016.]

WPI 380.04

NUISANCE PER SE

A statute provides as follows:

(Insert a brief description of the requirements of the statute.)

If you find that (name of defendant) **violated this statute, then you must find that** (name of defendant) **committed a nuisance and that** (name of plaintiff) **has satisfied its burden of proving the first and second propositions found in Instruction** (fill in number of the instruction that is based on WPI 380.05).

NOTE ON USE

Use when the plaintiff alleges violation of a statute or regulation that is, by its terms, a nuisance per se. Use this instruction with WPI 380.05 (Nuisance—Burden of Proof—No Affirmative Defense).

COMMENT

Engaging in any business or profession in violation of the law regulating or prohibiting the same is a nuisance per se. Kitsap County v. Kev, Inc., 106 Wn.2d 135, 138, 720 P.2d 818 (1986); see Tiegs v. Boise Cascade Corp., 83 Wn.App. 411, 416, 420, 922 P.2d 115 (1996), affirmed in Tiegs v. Watts, 135 Wn.2d 1, 13, 954 P.2d 877 (1988). Failure to obtain required use permits and business licenses does not turn an otherwise lawful activity into a nuisance per se. Moore v. Steve's Outboard Service, 182 Wn.2d 151, 339 P.3d 169 (2014). In *Moore*, the operation of an outboard motor repair business without all the required permits did not render the business a nuisance per se. Conversely, erecting a fence on an easement in violation of the county code was a nuisance per se. Littlefair v. Schulze, 169 Wn.App. 659, 278 P.3d 218 (2012).

A nuisance per se is an act, thing, omission, or use of property which of itself is a nuisance, and hence is not permissible or excusable under any circumstance. Tiegs v. Watts, 135 Wn.2d 1, 13, 954 P.2d 877 (1988). Thus, a nuisance per se results in strict liability. Tiegs v. Boise Cascade Corp., 83 Wn.App. 411, 418, 922 P.2d 115 (1996). Although an act may not be a nuisance per se, it may still constitute a nuisance in fact by reason of circumstances. See Tiegs v. Watts, 135 Wn.2d at 13.

Several statutes creating nuisances per se can be found in RCW

Chapters 7.48 and 7.48A. Many others are located elsewhere in the revised code. See, e.g., RCW 7.42.010 (strict liability for a nuisance when a building or unit within a building is used for illegal activities involving controlled substances); City of Seattle v. McCoy, 101 Wn.App. 815, 4 P.3d 159 (2000) (city filed a nuisance per se action under RCW 7.42.010 against night club owner for drug activity; property owners attempted to abate the nuisance, contacted law enforcement, and ultimately were unable to control drug activity caused by patrons and others in the neighborhood; temporary takings doctrine was applied, and the city's enforcement of the nuisance action was held unconstitutional as applied); see also Paradise, Inc. v. Pierce County, 124 Wn.App. 759, 772–73, 102 P.3d 173 (2004) (RCW 9.46.295 and ordinance did not define gambling as a nuisance, but the statutory language implied legislative intent to categorize gambling as a nuisance); City of Woodinville v. Northshore United Church of Christ, 139 Wn.App. 639, 660–61, 162 P.3d 427 (2007), reversed on other grounds, 166 Wn.2d 633, 638, 641–47, 211 P.3d 406 (2009) (see discussion of this case in the Comment for WPI 380.01 (Nuisance In General—Definition)).

Other statutes that may support a nuisance per se claim include: RCW 4.24.040 (fire); RCW 14.08.030(4) (objects and plants at airports); RCW 16.08.010 and 16.08.040 (dogs); RCW 16.24.110 (unrestrained horses, mules, donkeys, cattle); RCW 17.28.170 and 17.28.185 (mosquitoes); RCW 35.88.080 (sewage); RCW 46.55.240 and 47.41.070 (junk); RCW 67.16.060 (horse racing); RCW 77.57.030 (property owner with a dam or obstruction, after having been served with notice to construct a fishway); RCW 90.48.142 (water pollution); RCW 90.64.030 (water pollution caused by dairy cattle).

[Current as of September 2016.]

WPI 380.05

NUISANCE—BURDEN OF PROOF—NO AFFIRMATIVE DEFENSE

(Name of plaintiff) has the burden of proving each of the following propositions with respect to the claim of nuisance:

(1) That (name of defendant) [acted unlawfully] [failed to perform a duty]; and

(2) That the [unlawful act] [failure to perform a duty]:

[annoyed, injured, or endangered the comfort, repose, health, or safety of others;] [or]

[offended decency;] [or]

[unlawfully interfered with, obstructed or tended to obstruct, or rendered dangerous for passage, any lake, navigable river, bay, stream, canal, or basin;] [or]

[unlawfully interfered with, obstructed or tended to obstruct, or rendered dangerous for passage any public park, square, street, or highway;] [or]

[in any way rendered other persons insecure in life, or in the use of property;] [and]

(3) That (name of defendant's) [act] [failure to perform a duty] was a proximate cause of [injury to (name of plaintiff)] [and] [or] [damage to (name of plaintiff's) property].

If you find from your consideration of all the evidence that each of these propositions has been proved, your verdict should be for (name of plaintiff) on the nuisance claim. On the other hand, if any of these propositions has not been proved, your verdict should be for (name of defendant) on the nuisance claim.

NOTE ON USE

Use with WPI 380.01 (Nuisance in General—Definition). For cases using a modified definition of nuisance under WPI 380.01.01 (Nuisance—Example of Modified Definition—Interference with Use of Street or Highway), modify the instruction along the lines discussed in the Comment below.

COMMENT

The form of this instruction comes from WPI 21.02 (Burden of Proof on the Issues—No Affirmative Defense).

The instruction incorporates the language of RCW 7.48.120 and the ruling of the Washington Supreme Court in Tiegs v. Watts, 135 Wn.2d 1, 954 P.2d 877 (1998).

The elements in the instruction are drafted to track the definition of nuisance that the jurors receive in WPI 380.01 (Nuisance in General—Definition), which is based on the statutory definition contained in RCW 7.48.120. In some cases, however, the jurors will be instructed with a modified definition of nuisance, based on sources of law other than RCW 7.48.120, such as WPI 380.01.01 (Nuisance—Example of Modified Definition—Interference with Use of Street or Highway). For these cases, the instruction above will need to be revised to track the modified definition.

[Current as of September 2016.]

WPI 380.06

NUISANCE—BURDEN OF PROOF—ASSUMPTION OF RISK DEFENSE (COMING TO THE NUISANCE)

It is a defense to an action for damages based upon a claim of nuisance, that the plaintiff assumed the risk of harm or loss by locating at or near an established local nuisance. Though this fact (if proved) does not absolutely bar (name of plaintiff's) **claim for damages, it is one factor to be considered by you when considering how much, (if any), damages you should award** (name of plaintiff).

The defendant, (name of defendant), **has the burden of proving the following proposition:**

> **That** (name of plaintiff) **knew of** (name of defendant's) **use of [his] [her] property when** (name of plaintiff) **[purchased property] [improved property] [elected to live] in close proximity to** (name of defendant's) **property. In this context, "use of property" means the use that** (name of plaintiff) **contends was the cause of [his] [her] damages.**

If you find from your consideration of all the evidence that this proposition has been proved, then, using 100% as the total combined conduct of the parties (nuisance and assumption of risk) which contributed to (name of plaintiff's) **damages, you must reduce the total damages you find to have been sustained by** (name of plaintiff), **by the percentage of that conduct attributable to the risk assumed by** (name of plaintiff). **I will furnish you with a special verdict form for this purpose.**

NOTE ON USE

Use this instruction for cases involving the defense of assumption of risk. This instruction will be used together with the general definition instruction, WPI 380.01, and the balancing test instruction, WPI 380.03, and in an appropriate case may be used with the public/private nuisance definition, WPI 380.02.

COMMENT

This instruction is based upon RCW 4.22.015 and 4.22.070; DiBlasi v. City of Seattle, 136 Wn.2d 865, 888, 969 P.2d 10 (1998) (concurring opinion); Buchanan v. Simplot Feeders, Ltd. Partnership, 134 Wn.2d 673, 678, 952 P.2d 610 (1998); Albin v. National Bank of Commerce, 60 Wn.2d 745, 753, 375 P.2d 487 (1962); and Powell v. Superior Portland Cement, 15 Wn.2d 14, 18–19, 129 P.2d 536 (1942).

[Current as of September 2016.]

APPENDICES

APPENDIX A A JUROR'S GUIDE

(WITHDRAWN)

The Juror's Information Guide that is distributed by many courts to prospective jurors is available on the Washington Courts website at http://www.courts.wa.gov/newsinfo/resources/ (last visited September 5, 2018).

APPENDIX B LIFE EXPECTANCY TABLE

(Based on Washington Insurance Commissioner's Tables; see the Comment below)

AGE NEAREST BIRTHDAY	MALE	FEMALE
0	76.20	81.04
1	75.71	80.49
2	74.74	79.53
3	73.76	78.54
4	72.78	77.56
5	71.79	76.57
6	70.81	75.58
7	69.82	74.59
8	68.83	73.59
9	67.83	72.60
10	66.84	71.61
11	65.84	70.61
12	64.85	69.62
13	63.86	68.63
14	62.87	67.64
15	61.89	66.65
16	60.92	65.66
17	59.95	64.68
18	58.99	63.69
19	58.04	62.71
20	57.10	61.74
21	56.16	60.76
22	55.22	59.79
23	54.30	58.81
24	53.37	57.84
25	52.44	56.87
26	51.51	55.90
27	50.58	54.93
28	49.65	53.96
29	48.71	52.99

LIFE EXPECTANCY TABLE

AGE NEAREST BIRTHDAY	MALE	FEMALE
30	47.78	52.02
31	46.85	51.05
32	45.92	50.09
33	44.98	49.12
34	44.05	48.16
35	43.12	47.20
36	42.18	46.24
37	41.25	45.29
38	40.32	44.33
39	39.40	43.38
40	38.47	42.43
41	37.55	41.48
42	36.63	40.54
43	35.72	39.60
44	34.82	38.67
45	33.92	37.74
46	33.03	36.81
47	32.15	35.90
48	31.27	34.98
49	30.41	34.08
50	29.55	33.17
51	28.70	32.28
52	27.86	31.39
53	27.03	30.51
54	26.21	29.63
55	25.39	28.75
56	24.59	27.88
57	23.79	27.01
58	23.01	26.15
59	22.23	25.30
60	21.46	24.45
61	20.69	23.61
62	19.93	22.78
63	19.18	21.95
64	18.44	21.13
65	17.70	20.33
66	16.98	19.53
67	16.27	18.74

LIFE EXPECTANCY TABLE

AGE NEAREST BIRTHDAY	MALE	FEMALE
68	15.57	17.97
69	14.88	17.21
70	14.20	16.45
71	13.53	15.71
72	12.88	14.98
73	12.23	14.26
74	11.61	13.56
75	11.00	12.87
76	10.40	12.20
77	9.82	11.54
78	9.25	10.90
79	8.71	10.28
80	8.18	9.67
81	7.67	9.08
82	7.18	8.51
83	6.71	7.96
84	6.26	7.43
85	5.83	6.93
86	5.43	6.45
87	5.05	6.00
88	4.70	5.58
89	4.37	5.19
90	4.07	4.81
91	3.78	4.47
92	3.52	4.15
93	3.28	3.85
94	3.06	3.57
95	2.85	3.32
96	2.67	3.08
97	2.49	2.87
98	2.34	2.68
99	2.20	2.50
100	2.07	2.34
101	1.96	2.19
102	1.85	2.06
103	1.76	1.94
104	1.68	1.84
105	1.60	1.74

LIFE EXPECTANCY TABLE

AGE NEAREST BIRTHDAY	MALE	FEMALE
106	1.53	1.66
107	1.47	1.58
108	1.42	1.51
109	1.37	1.45
110	1.33	1.40
111	1.29	1.35
112	1.26	1.31
113	1.23	1.27
114	1.20	1.24
115	1.17	1.21
116	1.14	1.17
117	1.11	1.13
118	1.04	1.05
119	0.88	0.89
120	0.50	0.50

NOTE ON USE

Age should be computed as of the nearest birthday of the person under consideration. For the instruction to the jury, see WPI 34.04 (Mortality Table—Limitation on Use).

COMMENT

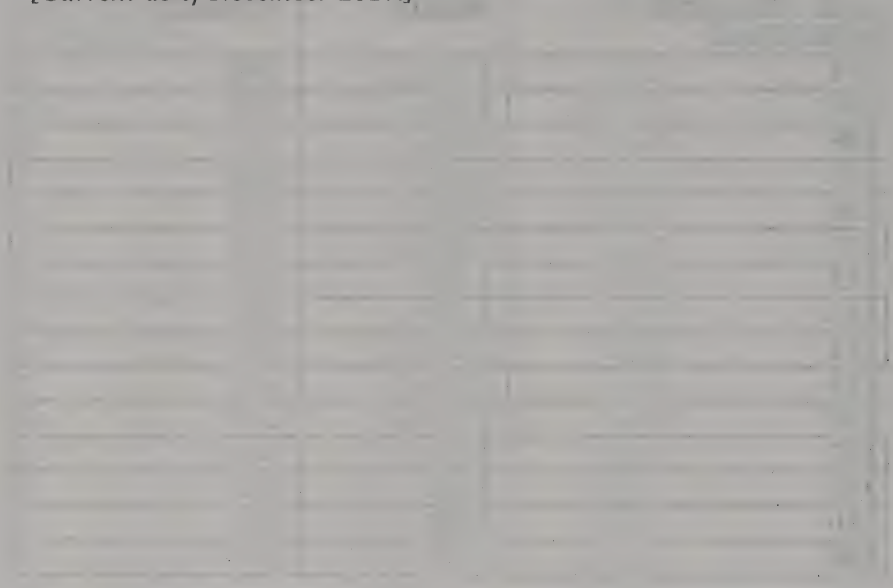
The above table is based on the Life Expectancy Tables published by the Insurance Commissioner of the State of Washington. The above table is current as of the date indicated at the end of this Comment. The Insurance Commissioner's website may be consulted for the most recent table. See http://www.insurance.wa.gov.

Pursuant to RCW 48.02.160, the Insurance Commissioner is required to "[o]btain and publish for the use of courts and appraisers throughout the state, tables showing the average expectancy of life and values of annuities and of life and term estates."

In Bradshaw v. City of Seattle, 43 Wn.2d 766, 784, 264 P.2d 265, 275, 42 A.L.R.2d 800 (1953), a wrongful death case, the plaintiff introduced a mortality table taken from the 1952 or 1953 World Almanac. While there was some discrepancy between this table and that published by the Insurance Commissioner, the court did not find error, its rationale being that "average life expectancy" is but a guide to the jury and not conclusive on the question. The court noted the above-quoted statute, however, and stated that: "In the interest of uniformity, we suggest that the table published by the insurance commissioner pursuant to this statute should be used by the courts in guiding juries as to life expectancy."

LIFE EXPECTANCY TABLE

[Current as of November 2017.]



APPENDIX C THE CIVIL JURY TRIAL

Summarized in Narrative and Scenario Outline

(WITHDRAWN)

APPENDIX D SUGGESTED COMBINATIONS OF INSTRUCTIONS

INTRODUCTION

Many of the instructions in this volume lend themselves to being combined with other instructions. When two or more instructions address interrelated topics and are not already lengthy, juror understanding may be enhanced by combining them into a single instruction. This appendix includes some examples for combining instructions. Judges and practitioners are encouraged to use other combinations as appropriate.

This appendix is intended as a handy tool in the use of the WPI instructions and not as an amendment of the instructions as they appear in the main volume. The instructions in this appendix will not fit all cases. Variations will have to be made for particular cases by reference to the main volume.

In the following examples, the parties are referred to with the labels "plaintiff" and "defendant." In drafting instructions for a particular case, however, practitioners should remembers that juror understanding is often enhanced when the instructions use the parties' names rather than these labels.

Table of Combined Instructions

Appendix D Number	WPI Numbers	Description of Combined Instruction
1	20.01 20.05	Issues instruction for claim of negligence without contributory negligence.
2	20.01 20.05	Issues instruction for claim of negligence and contributory negligence.
3	21.02 21.05	Burden of proof instruction for a claim of negligence and one affirmative defense other than contributory negligence, when contributory negligence is not claimed; injury and property damage.
4	21.01 15.01 10.01 10.02	Definitions instruction for claim of negligence without contributory negligence, using traditional definition of proximate cause.

Appendix D Number	WPI Numbers	Description of Combined Instruction
5	21.01 15.01 10.01 10.02 11.01 11.07	Definitions instruction for claim of negligence and contributory negligence, using traditional definition of proximate cause.
6	10.01 10.02 60.03 60.01	Definitions instruction for negligence claim arising from a statutory violation.
7	23.01 21.01 15.01	Issues, burden of proof, and definitions instruction for directed verdict or admitted liability case; no contributory negligence; traditional definition of proximate cause.
8	13.03 21.12	Definitions and burden of proof instruction for implied primary assumption of risk.
9	1.08 1.09	Concluding instruction for case involving single plaintiff, single defendant, and general verdict forms WPI 45.01 or 45.20.

App. D No. 1

(20.01 and 20.05: Issues instruction for claim of negligence without contributory negligence.)

No. _____

The plaintiff claims that the defendant was negligent in _____. The plaintiff claims that _____ was a proximate cause of injuries and damage to plaintiff. The defendant denies these claims. The defendant further denies the nature and extent of the claimed injuries and damage.

The foregoing is merely a summary of the claims of the parties. You are not to consider the summary as proof of the matters claimed and you are to consider only those matters that are established by the evidence. These claims have been outlined solely to aid you in understanding the issues.

App. D No. 2

(20.01 and 20.05: Issues instruction for claim of negligence and contributory negligence.)

No. _____

The plaintiff claims that the defendant was negligent in

_____. The plaintiff claims that _____ was a proximate cause of injuries and damage to plaintiff. The defendant denies these claims. The defendant further denies the nature and extent of the claimed injuries and damage.

In addition, the defendant claims as an affirmative defense that the plaintiff was contributorily negligent in _____. The defendant claims that _____ was a proximate cause of plaintiff's own injuries and damage. The plaintiff denies these claims. The plaintiff further denies the nature and extent of the claimed injuries and damage.

The foregoing is merely a summary of the claims of the parties. You are not to consider the summary as proof of the matters claimed and you are to consider only those matters that are established by the evidence. These claims have been outlined solely to aid you in understanding the issues.

App. D No. 3

(21.02 and 21.05: Burden of proof instruction for a claim of negligence and one affirmative defense other than contributory negligence, when contributory negligence is not claimed; injury and property damage. The final paragraph of WPI 21.02 has been modified as suggested in the Note on Use to WPI 21.05.)

No. _____

The plaintiff has the burden of proving each of the following propositions:

(1) That the defendant acted, or failed to act, in one of the ways claimed by the plaintiff and that in so acting, or failing to act, the defendant was negligent;

(2) That the plaintiff was injured and the plaintiff's property was damaged;

(3) That the negligence of the defendant was a proximate cause of the injury to the plaintiff and the damage to plaintiff's property.

The defendant has the burden of proving the following affirmative defense claimed by the defendant:

If you find from your consideration of all the evidence that each of these propositions has been proved on which the plaintiff has the burden of proof, and that the defendant's affirmative defense has not been proved, your verdict should be for the plaintiff. On the other hand, if the defendant's affirmative defense has been proved, or if any of these propositions on which the plaintiff has the burden of proof has not been proved, your verdict should be for the defendant.

App. D No. 4

(21.01, 15.01, 10.01, and 10.02: Definitions instruction for claim of negligence without contributory negligence, using traditional definition of proximate cause.)

No. _____

When it is said that a party has the burden of proof on any proposition, or that any proposition must be proved by a preponderance of the evidence, or the expression "if you find" is used, it means that you must be persuaded, considering all the evidence in the case, that the proposition on which that party has the burden of proof is more probably true than not true.

The term "proximate cause" means a cause which in a direct sequence, unbroken by any new independent cause, produces the injury complained of and without which such injury would not have happened.

Negligence is the failure to exercise ordinary care. It is the doing of some act that a reasonably careful person would not do under the same or similar circumstances or the failure to do some act that a reasonably careful person would have done under the same or similar circumstances.

Ordinary care means the care a reasonably careful person would exercise under the same or similar circumstances.

App. D No. 5

(21.01, 15.01, 10.01, 10.02, 11.01, and 11.07: Definitions instruction for claim of negligence and contributory negligence, using traditional definition of proximate cause.)

No. _____

When it is said that a party has the burden of proof on any proposition, or that any proposition must be proved by a preponderance of the evidence, or the expression "if you find" is used, it means that you must be persuaded, considering all the evidence in the case, that the proposition on which that party has the burden of proof is more probably true than not true.

The term "proximate cause" means a cause which in a direct sequence, unbroken by any new independent cause, produces the injury complained of and without which such injury would not have happened.

Negligence is the failure to exercise ordinary care. It is the doing of some act that a reasonably careful person would not do under the same or similar circumstances or the failure to do some act that a reasonably careful person would have done under the same or similar circumstances.

Ordinary care means the care a reasonably careful person would exercise under the same or similar circumstances.

Contributory negligence is negligence on the part of a person claiming injury or damage that is a proximate cause of the injury or damage complained of. If you find contributory negligence, you must determine the degree of negligence, expressed as a percentage, attributable to the person claiming injury or damage. The court will furnish you a special verdict form for this purpose. Your answers to the questions in the special verdict form will furnish the basis by which the court will apportion damages, if any.

App. D No. 6

(10.01, 10.02, 60.03, and 60.01: Definitions instruction for negligence claim arising from a statutory violation.)

No. _____

Negligence is the failure to exercise ordinary care. It is the doing of some act that a reasonably careful person would not do under the same or similar circumstances or the failure to do some act that a reasonably careful person would have done under the same or similar circumstances.

Ordinary care means the care a reasonably careful person would exercise under the same or similar circumstances.

The violation, if any, of a statute is not necessarily negligence, but may be considered by you as evidence in determining negligence. A statute provides that: (*insert quotation from, or paraphrasing of, applicable statutory language*).

App. D No. 7

(23.01, 21.01, and 15.01: Issues, burden of proof, and definitions instruction for directed verdict or admitted liability case; no contributory negligence; traditional definition of proximate cause.)

No. _____

The defendant is liable for any injury or damage that was proximately caused by the occurrence. The plaintiff has the burden of proving what injuries or damages to the plaintiff were proximately caused by this occurrence and what amount the plaintiff should recover.

When it is said that a party has the burden of proof on any proposition, or that any proposition must be proved by a preponderance of the evidence, or the expression "if you find" is used, it means that you must be persuaded, considering all the evidence in the case, that the proposition on which that party has the burden of proof is more probably true than not true.

The term "proximate cause" means a cause which in a direct sequence, unbroken by any new independent cause, produces the injury complained of and without which such injury would not have happened.

App. D No. 8

(13.03 and 21.12: Definitions and burden of proof for implied primary assumption of risk.)

No. _____

It is a defense to an action for personal injury that the person injured impliedly assumed a specific risk of harm.

A person impliedly assumes a risk of harm, if that person knows of the specific risk associated with an activity, understands its nature, voluntarily chooses to accept the risk by engaging in that activity, and impliedly consents to relieve the defendant of a duty of care owed to the person in relation to the specific risk.

To establish this defense, the defendant has the burden of proving each of the following propositions:

(1) That the person injured had knowledge of the specific risk associated with (the activity);

(2) That the person injured understood the nature of this risk; and

(3) That the person injured voluntarily chose to accept the risk by engaging in (the activity) and impliedly consented to relieve the defendant of the duty of care owed to the person injured in relation to the risk.

If you find from your consideration of all the evidence that each of these propositions has been proved, then, using 100% as the total combined conduct of the parties (negligence and assumption of risk) that contributed to the plaintiff's damages, you must reduce the total damages you find to have been sustained by the plaintiff, by the percentage of that conduct attributable to the risk specifically assumed by the person injured. The court will furnish you with a special verdict form for this purpose.

App. D No. 9

(1.08 and 1.09: Concluding instruction for case involving single plaintiff, single defendant, and general verdict forms WPI 45.01 or 45.20.)

No. _____

When you are taken to the jury room to deliberate, your first duty is to select a presiding juror. The presiding juror's responsibility is to see that you discuss the issues in this case in an orderly and reasonable manner, that you discuss each issue submitted for your decision fully and fairly, and that each one of you has a chance to be heard on every question before you.

You will be given the exhibits admitted in evidence, these instructions, and _____ verdict forms for recording your verdict.

If you decide the case in favor of the plaintiff, then you will use Verdict Form A and fill in the amount. If you decide the case for the defendant, then you will use Verdict Form B.

During your deliberations, you may discuss any notes that you have taken during the trial, if you wish. You have been allowed to take notes to assist you in remembering clearly, not to substitute for your memory or the memories or notes of other jurors. However, do not assume that your notes are more or less accurate than your memory.

You will need to rely on your notes and memory as to the testimony presented in this case. Testimony will rarely, if ever, be repeated for you during your deliberations.

If you need to ask the court a question that you have been unable to answer among yourselves after reviewing the evidence and instructions, write the question simply and clearly. The presiding juror should sign and date the question and give it to the bailiff. The court will confer with counsel to determine what answer, if any, can be given.

In your question to the court, do not indicate how your deliberations are proceeding. Do not state how the jurors have voted on any particular question, issue, or claim, or in any other way express your opinions about the case.

In order to reach a verdict ten of you must agree. When ten of you have agreed, then the presiding juror will fill in the verdict form. The presiding juror must sign the verdict whether or not the presiding juror agrees with it. The presiding juror will then inform the bailiff that you have reached a verdict. The bailiff will conduct you back into this courtroom where the verdict will be announced.

APPENDIX E ILLUSTRATIVE SETS OF INSTRUCTION

Section 1: Introduction

Section 2: Illustrative Set of Instructions Involving Single Pedestrian and Motor Vehicle (No Affirmative Defense/ No "Empty Chairs")

Section 3: Illustrative Set of Instructions Involving Right Angle Automobile Collision at Uncontrolled Intersection (Single Plaintiff and Corporate Defendant With Contributory Negligence Defense)

Section 4: Illustrative Sequence of Instructions for Workers' Compensation Cases

Appendix E—SECTION 1

INTRODUCTION

Hard-pressed trial courts and attorneys frequently follow the path of least resistance when faced with the necessity of instructing a jury on the issues of the case. It is not uncommon for the important introductory instruction to be a series of quotations from the pleadings. Although it is not error to follow this procedure, see Murray v. Mossman, 52 Wn.2d 885, 329 P.2d 1089 (1958), and while the pressure of trial may make the apparent short-cut attractive, it should be avoided.

The instruction on issues is important. A juror's ability to understand and to properly apply all other instructions stems from an understanding of the issues. While it takes less time and thought to quote at length from the pleadings, the result is seldom conducive to the brevity and clarity necessary for a jury to understand the essential issues of the case. Thus, both court and counsel should endeavor to draft an instruction that is as concise and meaningful as possible by limiting it to the absolute essentials as suggested in WPI Chapter 20, Issues in the Case. The use of WPI pattern instructions is preferred, but not mandatory. Sutton v. Shufelberger, 31 Wn.App. 579, 643 P.2d 920 (1982); see also CR 51(d)(1).

A party is entitled to have his or her theory of the case presented to the jury by proper instructions if there is substantial evidence to support such instructions. Stiley v. Block, 130 Wn.2d 486, 925 P.2d 194 (1996). The instructions on a party's theory of the case are sufficient if they afford counsel ample opportunity to argue the theory of the case to the jury. Washburn v. Beatt Equip. Co., 120 Wn.2d 246, 840 P.2d 860 (1992). The court may properly refuse to give a proposed instruction when it is adequately covered in other instructions. Havens v. C & D Plastics, Inc., 124 Wn.2d 158, 876 P.2d 435 (1994); Herring v. Dep't of Soc. Hlth. Svcs., 81 Wn.App. 1, 914 P.2d 67 (1996).

It is within the trial court's discretion to determine how many instruc-

tions are necessary to present fairly each litigant's theory of the case. Young v. Key Pharmaceuticals, Inc., 130 Wn.2d 160, 922 P.2d 59 (1996); Havens v. C & D Plastics, Inc., 124 Wn.2d 158, 876 P.2d 435 (1994). The trial court has considerable discretion in wording instructions. If they are readily understandable and not misleading to the ordinary mind, and if counsel may satisfactorily argue his or her theory to the jury, the instructions are sufficient. Young v. Key Pharmaceuticals, Inc., 130 Wn.2d 160; Havens v. C & D Plastics, Inc., 124 Wn.2d 158.

The trial court should refuse to give proposed instructions that are argumentative or slanted. Watson v. Hockett, 107 Wn.2d 158, 727 P.2d 669 (1986). The trial court has no obligation to buttress jury arguments with supporting instructions. Short v. Hoge, 58 Wn.2d 50, 360 P.2d 565 (1961). A trial judge may exercise discretion in determining whether words used in instructions require definition. State v. Guloy, 104 Wn.2d 412, 705 P.2d 1182 (1985); State v. Schimmelpfennig, 92 Wn.2d 95, 594 P.2d 442 (1979).

An attorney who desires to have an instruction given to the jury or to have an instruction adapted to a particular view or to meet a situation that the attorney wants to have covered, has the burden of submitting it to the court in writing. CR 51(c) and (d); Cole v. McGhie, 59 Wn.2d 436, 361 P.2d 938 (1961). It is not error for the court to refuse to give requested instruction if it is not in writing. Cole v. McGhie, 59 Wn.2d 436; CR 51(e).

Proposed instructions that incorrectly state the law are properly refused. Kastanis v. Educational Employees Credit Union, 122 Wn.2d 483, 859 P.2d 26 (1993), 865 P.2d 507 (1994). Instructions must be considered together, as a whole, when determining whether they properly state the law. Cox v. Spangler, 141 Wn.2d 431, 5 P.3d 1265 (2000); Oregon Mut. Ins. Co. v. Barton, 109 Wn.App. 405, 36 P.3d 1065 (2001). It is not incumbent upon the trial court to rewrite an incorrect statement of the law contained in a requested instruction. Harris v. Groth, 99 Wn.2d 438, 663 P.2d 113 (1983); Krogh v. Pemble, 50 Wn.2d 250, 310 P.2d 1069 (1957). Misleading instructions may likewise be rejected. McCluskey v. Handorff-Sherman, 68 Wn.App. 96, 841 P.2d 1300 (1992).

A trial court may properly refuse to give a proposed instruction if there is no evidence to support it. Christensen v. Munsen, 123 Wn.2d 234, 867 P.2d 626 (1994); Stiley v. Block, 130 Wn.2d 486, 925 P.2d 194 (1996). Care must be used to insure that the jury is instructed on a theory supported by the *evidence,* Lofgren v. Western Washington Corp. of Seventh Day Adventists, 65 Wn.2d 144, 396 P.2d 139 (1964), and not only by the *pleadings.*

A verdict may be reversed and a new trial granted only if the instructional error is prejudicial. Furfaro v. Seattle, 144 Wn.2d 363, 27 P.3d 1160 (2001); Stiley v. Block, 130 Wn.2d 486, 925 P.2d 194 (1996). The instructional error is prejudicial if the reviewing court has substantial doubt that the jury was fairly guided in its deliberations, Furfaro v. Seattle, 144 Wn.2d 363, or if the trial outcome would have been different without the error. Stiley v. Block, 130 Wn.2d 486; Caruso v. Local Union 690, 107 Wn.2d 524, 730 P.2d 1299 (1987).

Prior to submitting the case to the jury, the judge is required to give all counsel copies of the proposed instructions. CR 51(f). This is to afford counsel a timely opportunity to call the court's attention to any mistakes. Burlingham-Meeker Co. v. Thomas, 58 Wn.2d 79, 360 P.2d 1033 (1961).

Counsel's objections to the proposed instruction must indicate the specific points objected to. CR 51(f); Falk v. Keene Corp., 113 Wn.2d 645, 782 P.2d 974 (1989). Mere general objections are insufficient. Couch v. Mine Safety Appliances, 107 Wn.2d 232, 728 P.2d 585 (1986); Burlingham-Meeker Co. v. Thomas, 58 Wn.2d 79. The purpose of requiring that exceptions be sufficiently definite is to apprise the trial judge of the points of law or questions of fact in dispute so that mistakes may be corrected. Falk v. Keene Corp., 113 Wn.2d 645.

An instruction to which no proper objection is taken becomes the law of the case. Caruso v. Local Union 690, 107 Wn.2d 524, 730 P.2d 1299 (1987); Wright v. City of Kennewick, 62 Wn.2d 163, 381 P.2d 620 (1963).

Finally, there has been a tendency for some lawyers to propose lengthy, involved, and argumentative instructions although the needs of the jury are best served when the number and length of instructions are held to a minimum. In such cases the trial judge should take the initiative in selecting the instructions which should be given. This book will make it practicable, in most cases, for the judge to undertake the task of providing the jury with fewer instructions and a fairer statement of the law applicable to the case.

Following are a group of hypothetical cases with a suggested set of instructions for each case. Also included is a recommended sequence for instructions in a workers' compensation case.

Appendix E—SECTION 2

ILLUSTRATIVE SET OF INSTRUCTIONS INVOLVING SINGLE PEDESTRIAN AND MOTOR VEHICLE (NO AFFIRMATIVE DEFENSE/NO "EMPTY CHAIRS")

Typical factual situation: The plaintiff was injured while crossing a street from east to west in the north crosswalk at a city street intersection. The crosswalk was marked. Plaintiff was struck by an automobile being driven in a northerly direction by the defendant. Plaintiff's leg was broken, and as a result of this injury, plaintiff was hospitalized for two weeks and missed two weeks' work without pay. There were no permanent injuries. The defendant denies liability and disputes the extent of plaintiff's injuries.

A checklist of suggested instructions in recommended sequences is as follows:

Instruction Number	WPI Numbers	Description of Instruction
1	1.02	Introductory instruction

Instruction Number	WPI Numbers	Description of Instruction
2	20.01 20.05	Issues instruction
3	21.02	Burden of proof instruction
4	21.01 15.01 10.01 10.02	Definitions instruction
5	70.01	Instruction on driver's duty
6	70.03 60.03	Instruction on right of way
7	30.01.01 30.07.01 30.08.01 30.04 30.06	Damages instruction
8	1.08 1.09	Concluding instruction
9	45.20	Special verdict form

The text of the suggested instructions listed in their recommended sequence is as follows:

No. 1: WPI 1.02

(Introductory Instruction)

Use WPI 1.02.

No. 2: WPI 20.01 and 20.05 (combined)

(Summary of Issues)

The plaintiff claims that the defendant was negligent in one or more of the following respects:

(1) In failing to yield the right of way to a pedestrian within a crosswalk as required by a statute of the State of Washington.

(2) In the operation of his automobile in view of the conditions then prevailing.

The plaintiff claims that one or more of these acts was a proximate cause of injuries and damage to the plaintiff. The defendant denies these claims. The defendant further denies the nature and extent of the claimed injuries and damage.

The foregoing is merely a summary of the claims of the parties. You are not to consider the summary as proof of the matters claimed and you are to consider only those matters that are established by the evidence. These claims have been outlined solely to aid you in understanding the issues.

No. 3: WPI 21.02

(Burden of Proof)

The plaintiff has the burden of proving each of the following propositions:

(1) That the defendant acted, or failed to act, in one of the ways claimed by the plaintiff and that in so acting, or failing to act, the defendant was negligent;

(2) That the plaintiff was injured or plaintiff's property was damaged; and

(3) That the negligence of the defendant was a proximate cause of the injury to the plaintiff or the damage to plaintiff's property.

If you find from your consideration of all the evidence that each of these propositions has been proved, your verdict should be for the plaintiff. On the other hand, if any of these propositions has not been proved, your verdict should be for the defendant.

No. 4: WPI 21.01, 15.01, 10.01, and 10.02 (combined)

(Definitions)

When it is said that a party has the burden of proof on any proposition, or that any proposition must be proved by a preponderance of the evidence, or the expression "if you find" is used, it means that you must be persuaded, considering all the evidence in the case, that the proposition on which that party has the burden of proof is more probably true than not true.

The term "proximate cause" means a cause which in a direct sequence, unbroken by any new independent cause, produces the injury complained of and without which such injury would not have happened.

Negligence is the failure to exercise ordinary care. It is the doing of some act that a reasonably careful person would not do under the same or similar circumstances or the failure to do some act that a reasonably careful person would have done under the same or similar circumstances.

Ordinary care means the care a reasonably careful person would exercise under the same or similar circumstances.

No. 5: WPI 70.01

(Driver's Duty)

It is the duty of every person using a public street or highway to

exercise ordinary care to avoid placing others in danger and to exercise ordinary care to avoid a collision.

No. 6: WPI 70.03 and 60.03 (combined)

(Right of Way Between Driver and Pedestrian)

A statute provides:

(1) That the driver of a vehicle shall yield the right of way, slowing down or stopping if necessary, to a pedestrian crossing the roadway within a crosswalk when the pedestrian is upon the half of the roadway upon which the vehicle is traveling or approaching so closely from the opposite half of the roadway as to be in danger;

(2) That a pedestrian crossing a roadway at any point other than within a crosswalk shall yield the right of way to all vehicles upon the roadway.

This right of way, however, is not absolute but relative, and the duty to exercise ordinary care to avoid collisions rests upon both parties. The primary duty, however, rests upon the party not having the right of way.

The violation, if any, of a statute is not necessarily negligence, but may be considered by you as evidence in determining negligence.

No. 7: WPI 30.01.01, 30.07.01, 30.08.01, 30.04, and 30.06 (combined)

(Damages)

It is the duty of the court to instruct you as to the measure of damages. By instructing you on damages the court does not mean to suggest for which party your verdict should be rendered.

If your verdict is for the plaintiff, then you must determine the amount of money that will reasonably and fairly compensate the plaintiff for such damages as you find were proximately caused by the negligence of the defendant.

You should consider the following past economic damages elements:

(1) The reasonable value of necessary medical care, treatment, and services received to the present time; and

(2) The reasonable value of earnings lost to the present time.

In addition you should consider the following noneconomic damages elements:

(1) The nature and extent of the injuries; and

(2) The pain and suffering experienced, and with reasonable probability to be experienced, in the future.

The burden of proving damages rests upon the plaintiff. It is for you

to determine, based upon the evidence, whether any particular element has been proved by a preponderance of the evidence.

Your award must be based upon evidence and not upon speculation, guess, or conjecture.

The law has not furnished us with any fixed standards by which to measure noneconomic damages. With reference to these matters you must be governed by your own judgment, by the evidence in the case, and by these instructions.

No. 8: WPI 1.08 and 1.09 (combined)

Concluding Instruction

Use WPI 1.08, filling in the blank with the WPI 1.09's directions for using verdict forms.

No. 9: WPI 45.20

(Verdict Form)

Use two verdict forms, A and B, as they appear in WPI 45.20.

Appendix E—SECTION 3

ILLUSTRATIVE SET OF INSTRUCTIONS INVOLVING RIGHT ANGLE AUTOMOBILE COLLISION AT UNCONTROLLED INTERSECTION (SINGLE PLAINTIFF AND CORPORATE DEFENDANT WITH CONTRIBUTORY NEGLIGENCE DEFENSE)

Typical factual situation: The plaintiff, an employed woman, was driving her automobile in an easterly direction approaching an uncontrolled intersection. A delivery truck being driven by an employee of a corporation was proceeding in a southerly direction approaching the same intersection. The truck prominently displayed the corporation's sign. At the time of the collision, the truck was approximately one mile from its regular route having been forced to detour by road construction.

The plaintiff sued only the corporation contending that the driver was in the course of employment. The defendant corporation admits its driver's agency but denies that the driver was in the course of employment.

Plaintiff's automobile was a total loss. Plaintiff was severely injured and required medical attention and hospitalization. These will also be required in the future. The injuries will be permanent. Defendant denies the nature and extent of plaintiff's injuries.

A check list of suggested instructions in recommended sequence is as follows:

Instruction Number	WPI Numbers	Description of Instruction
1	1.02	Introductory instruction
2	20.01 20.05	Issues instruction
3	21.03	Burden of proof instruction
4	21.01 15.01 10.01 11.01 11.07	Definitions instruction
5	70.01 70.02 70.06 60.03	Duties instruction for drivers
6	50.01 50.03 50.02	Agency instruction
7	30.02.01 30.07.01 30.08.01 30.15 30.07.02 30.08.02 30.04 30.05 30.06	Damages instruction
8	34.04	Life expectancy instruction
9	1.11	Concluding instruction
10	45.22	Special verdict form

The text of the suggested instruction listed in their recommended sequence is as follows:

No. 1: WPI 1.02

(Introductory Instruction)

Use WPI 1.02.

No. 2: WPI 20.01 and 20.05 (combined)

(Summary of Issues)

The plaintiff claims that the defendant is liable because the defendant's driver was negligent in one or more of the following respects:

(1) In failing to observe the plaintiff entering the intersection.

(2) In failing to apply his brakes or slow his vehicle.

(3) In failing to keep his truck under proper control for the conditions existing at that time and place.

(4) In failing to yield the right of way as required by a statute of the State of Washington.

The plaintiff claims that one or more of these acts was a proximate cause of injuries and damages to plaintiff. The defendant denies these claims.

The plaintiff also claims that at the time of the collision the defendant's driver was defendant's agent acting within the scope of employment. The defendant admits that the driver was defendant's agent, but denies that the driver was acting within the scope of employment.

In addition, the defendant claims as an affirmative defense, that the plaintiff was contributorily negligent in one or more of the following respects:

(1) In failing to observe the defendant's driver first entering the intersection.

(2) In failing to slow or stop the plaintiff's vehicle.

(3) In operating the automobile in such a way as to deceive the defendant's driver into believing that the plaintiff was not going to enter the intersection.

(4) In failing to yield the right of way as required by a statute of the State of Washington.

The defendant claims that one or more of these acts was a proximate cause of plaintiff's own injuries and damage. The plaintiff denies these claims.

The defendant further denies the nature and extent of the claimed injuries and damages.

The foregoing is merely a summary of the claims of the parties. You are not to consider the summary as proof of the matters claimed and you are to consider only those matters that are established by the evidence. These claims have been outlined solely to aid you in understanding the issues.

No. 3: WPI 21.03

(Burden of Proof)

The plaintiff has the burden of proving each of the following propositions:

(1) That the defendant acted, or failed to act, in one of the ways claimed by

the plaintiff and that in so acting, or failing to act, the defendant was negligent;

(2) That the plaintiff was injured and the plaintiff's property was damaged;

(3) That the negligence of the defendant was a proximate cause of the injury to the plaintiff and the damage to the plaintiff's property; and

(4) That the defendant's driver was acting within the scope of employment.

The defendant has the burden of proving both of the following propositions:

(1) That the plaintiff acted or failed to act in one of the ways claimed by the defendant, and that in so acting or failing to act, the plaintiff was negligent; and

(2) That the negligence of the plaintiff was a proximate cause of plaintiff's own injuries and was therefore contributory negligence.

No. 4: WPI 21.01, 15.01, 10.01, 10.02, 11.01, and 11.07

(Definitions)

When it is said that a party has the burden of proof on any proposition, or that any proposition must be proved by a preponderance of the evidence, or the expression "if you find" is used, it means that you must be persuaded, considering all the evidence in the case, that the proposition on which that party has the burden of proof is more probably true than not true.

The term "proximate cause" means a cause which in a direct sequence, unbroken by any new independent cause, produces the injury complained of and without which such injury would not have happened.

Negligence is the failure to exercise ordinary care. It is the doing of some act that a reasonably careful person would not do under the same or similar circumstances or the failure to do some act that a reasonably careful person would have done under the same or similar circumstances.

Ordinary care means the care a reasonably careful person would exercise under the same or similar circumstances.

Contributory negligence is negligence on the part of a person claiming injury or damage that is a proximate cause of the injury or damage complained of. If you find contributory negligence, you must determine the degree of negligence, expressed as a percentage, attributable to the person claiming injury or damage. The court will furnish you a special verdict form for this purpose. Your answers to the questions in the special verdict form will furnish the basis by which the court will apportion damages, if any.

No. 5: WPI 70.01, 70.02, 70.06, and 60.03 (combined)

(Duties)

It is the duty of every person using a public street or highway to exercise ordinary care to avoid placing others in danger and to exercise ordinary care to avoid a collision.

Every person using a public street or highway has the right to assume that other persons thereon will use ordinary care and will obey the rules of the road and has a right to proceed on such assumption until he or she knows, or in the exercise of ordinary care should know, to the contrary.

A statute provides that when two vehicles approach or enter an intersection from different streets or roadways at approximately the same time, the driver of the vehicle on the left shall yield the right of way to the vehicle on the right. This right of way, however, is not absolute but relative, and the duty to exercise ordinary care to avoid collisions at intersections rests upon both drivers. The primary duty, however, rests upon the driver on the left, which duty must be performed with reasonable regard to the maintenance of a fair margin of safety at all times. The violation, if any, of a statute is not necessarily negligence, but may be considered by you as evidence in determining negligence.

No. 6: WPI 50.01, 50.03, and 50.02 (combined)

(Agency)

An agent is a person employed under an express or implied agreement to perform services for another, called the principal, and who is subject to the principal's control or right to control the manner and means of performing the services.

Any act or omission of an agent within the scope of authority is the act or omission of the principal.

An agent is acting within the scope of authority if the agent is performing duties that were expressly or impliedly assigned to the agent by the principal or which were expressly or impliedly required by the contract of employment. Likewise, an agent is acting within the scope of authority if the agent is engaged in the furtherance of the principal's interests.

No. 7: WPI 30.02.01, 30.07.01, 30.08.01, 30.15, 30.07.02, 30.08.02, 30.04, 30.05, and 30.06 (combined)

(Damages)

It is the duty of the court to instruct you as to the measure of damages. By instructing you on damages the court does not mean to suggest for which party your verdict should be rendered.

If your verdict is for the plaintiff, then you must first determine the

amount of money required to reasonably and fairly compensate the plaintiff for the total amount of such damages as you find were proximately caused by the negligence of the defendant, apart from any consideration of contributory negligence.

You should consider the following past economic damages elements:

(1) The reasonable value of necessary medical care, treatment, and services received to the present time;

(2) The reasonable value of earnings lost to the present time; and

(3) The fair market value of any damaged property immediately before the occurrence.

In addition you should consider the following future economic damages elements:

(1) The reasonable value of necessary medical care, treatment, and services with reasonable probability to be required in the future; and

(2) The reasonable value of earnings with reasonable probability to be lost in the future.

In addition you should consider the following noneconomic damages elements:

(1) The nature and extent of the injuries;

(2) The disability experienced and with reasonable probability to be experienced in the future; and

(3) The pain and suffering experienced and with reasonable probability to be experienced in the future.

The burden of proving damages rests upon the plaintiff. It is for you to determine, based upon the evidence, whether any particular element has been proved by a preponderance of the evidence.

Your award must be based upon evidence and not upon speculation, guess, or conjecture.

The law has not furnished us with any fixed standards by which to measure noneconomic damages. With reference to these matters you must be governed by your own judgment, by the evidence in the case, and by these instructions.

No. 8: WPI 34.04

(Life Expectancy)

According to mortality tables, the average expectancy of life of a woman aged _____ years is _____ years. This one factor is not controlling, but should be considered in connection with all the other evidence bearing on the same question, such as that pertaining to the health, habits, and activity of the person whose life expectancy is in question.

No. 9: WPI 1.11

(Concluding Instruction)

Use WPI 1.11.

No. 10: WPI 45.22

(Special Verdict Form)

Use WPI 45.22.

Appendix E—SECTION 4

ILLUSTRATIVE SEQUENCE OF INSTRUCTIONS FOR WORKERS' COMPENSATION CASES

The special set of instructions for workers' compensation cases, Part XI, WPI Chapter 155, does not represent a comprehensive set of instructions. Nor should a practitioner expect to give all the instructions listed unless relevant in a given case, including such common instructions as WPI 155.13, Weighing Medical and Lay Testimony, or WPI 155.09, Extent of Disability or Aggravation—Basis of Medical Opinion. The practitioner should also consult other sections of the WPI for pertinent instructions of more general applicability.

In addition, the practitioner should recognize that the order and sequence of instructions may be a matter of preference, or may depend upon a particular case.

With these considerations in mind, below is a recommended sequence of pattern instructions for typical types of workers' compensation cases.

WPI Number	
155.01	Introductory Instruction
155.05	Negligence Not an Issue
1.07	Corporations and Similar Parties
1.03	Direct and Circumstantial Evidence
155.01.01	Evidence Limited to Record
155.04	Explanation of the Industrial Insurance System
155.02	Board's Findings
155.03	Burden of Proof
155.02.01	Issues

Specialized instructions, depending on facts of the case, such as:
Aggravation, Prior Award: 155.11 and 155.11.01
Aggravation, No Prior Award: 155.12 and 155.12.01

Permanent Total Disability: 155.07 and 155.07.01
Permanent Partial Disability: 155.08 and 155.08.01

Proximate cause instruction, depending on facts of the case:
Proximate Cause—Allowed Claim: 155.06 or 155.06.02
Proximate Cause—Rejected Claim: 155.06.01 or 155.06.03

2.10	Expert Testimony
155.13.01	Testimony of Attending Physician
155.13	Weighing Medical and Lay Testimony
155.09	Extent of Disability or Aggravation—Basis of Medical Opinion
155.10	Extent of Disability (if needed).
1.08	Concluding Instruction—For General Verdict Form (adapted to workers' compensation case)
155.14	Special Verdict—Workers' Compensation

APPENDIX F LANGUAGE INTERPRETERS IN TRIALS

For information on court interpreters, see the Washington Courts website at http://www.courts.wa.gov/programs_orgs/pos_interpret/ (last visited November 30, 2017).

APPENDIX G SELECTED RECOMMENDATIONS FROM THE WASHINGTON STATE JURY COMMISSION

In July 2000, the Washington State Jury Commission submitted a report recommending many changes to jury practices. The WPI Committee has incorporated the pertinent recommendations into this volume's instructions, Notes on Use, and Comments.

This appendix sets forth the text of the recommendations that most directly affect the instructions in this volume.

The Jury Commission's full report, which is too lengthy to include in this appendix, may be obtained from the Administrative Office of the Courts in Olympia, Washington, or at the Washington Court's website: http://www.courts.wa.gov/committee/pdf/jury_commission_report.pdf#search=Jury%20Commission.

Table of Recommendations

Jury Commission Recommendation	**Topic**
20	Protecting juror privacy during voir dire and after trial.
27	Instructing jurors at the beginning of the trial about the basic elements of claims and defenses.
29	Allowing jurors to take notes in all cases.
33	Allowing jurors to propose questions for witnesses in civil cases.
35	Giving jurors individual copies of final instructions.
37	Providing jurors with suggested deliberation procedures.
39	Instructing jurors how to submit questions to the court during deliberations.
40	Repeating trial testimony for deliberating jurors.
41	Offering assistance to a deadlocked jury.

20

THE COURT SHOULD TRY TO PROTECT JURORS FROM UNREASONABLE AND UNNECESSARY INTRUSIONS INTO THEIR PRIVACY DURING JURY SELECTION. IN ADDITION TO MONITORING LAWYERS' QUESTIONS, THE COURT SHOULD PROVIDE ALTERNATIVES FOR JURORS WHO DO NOT WISH TO ANSWER PARTICULAR QUESTIONS IN OPEN COURT. THE COURT SHOULD INFORM JURORS OF THESE OPTIONS BEFORE THEIR QUESTIONING.

DURING JURY SELECTION IN APPROPRIATE CASES, THE TRIAL COURT SHOULD SUBMIT WRITTEN QUESTIONNAIRES TO POTENTIAL JURORS REGARDING INFORMATION THAT THEY MAY BE EMBARRASSED TO DISCLOSE BEFORE OTHER JURORS. THE COURT SHOULD SOLICIT COUNSEL'S COMMENTS REGARDING THE APPROPRIATENESS OF SUCH A QUESTIONNAIRE AND ITS CONTENTS. THE COURT SHOULD INFORM THE POTENTIAL JURORS THAT THEIR QUESTIONNAIRES WILL REMAIN CONFIDENTIAL. THE COURT SHOULD DESTROY THE QUESTIONNAIRES OR MAINTAIN THEM, SEALED, IF NECESSARY TO PRESERVE THE RECORD. RELEVANT PORTIONS OF THE TRANSCRIPT OR TAPED RECORD SHOULD ALSO BE SEALED.

BEFORE DISMISSING JURORS FROM SERVICE ON A TRIAL, THE COURT SHOULD INFORM JURORS OF THEIR RIGHTS TO DISCUSS OR REFRAIN FROM DISCUSSING THE CASE.

Protecting Juror Privacy in Sensitive Cases

During jury selection in cases such as sexual harassment or sex crimes, counsel often will ask potential jurors whether they have ever been sexually harassed, assaulted, or molested. Jurors may find such questions embarrassing and intrusive and be less willing to speak publicly about their prior experience. In sensitive cases, the court should consider using written questionnaires and examining jurors outside the presence of other jurors. The questionnaires would identify which jurors should be separately questioned. Jurors' privacy would thereby be protected while still allowing the parties effective jury selection. The trial court has this discretion and should use it in appropriate cases.

Procedures for Juror Questionnaires

The court should solicit comments of counsel regarding both the appropriateness of a juror questionnaire and the

content of individual questions. The court should explain to the jurors the reasons for the questions. The questions should be simple, easy to read, and easy to answer.

Procedures When Dismissing Jurors

At the end of a trial, jurors are sometimes concerned about whether they should discuss the case with others. The jurors' concerns should be addressed by a brief discussion of their right of privacy. They should be informed of their right to speak, or not to speak, to anyone after trial. Further, they should be cautioned about the privacy interests of their fellow jurors and should be reminded not to disclose identifying information about other jurors.

27

IN BOTH CIVIL AND CRIMINAL CASES, AFTER THE JURY IS IMPANELED, THE JUDGE SHOULD INSTRUCT THE JURORS AS TO THE BASIC ELEMENTS OF THE CLAIMS, CHARGES, AND DEFENSES. THE JUDGE MUST INFORM THE JURORS THAT THE INSTRUCTIONS ARE PRELIMINARY ONLY AND THAT THEIR DELIBERATIONS MUST BE GOVERNED BY THE FINAL INSTRUCTIONS.

Pre-Instructing the Jury

Informing jurors about the applicable legal principles at the beginning of the case helps them to understand the testimony more easily and quickly. Studies confirm that pre-instructing jurors gives them a greater opportunity to focus on and remember the relevant evidence, improves their adherence to the judge's instructions, and increases juror satisfaction.

Cautioning the Jury

Jurors should be cautioned that the preliminary instructions are intended solely to assist them in evaluating the evidence during the trial. Because claims or defenses can be dropped or added during the course of a trial, the court should advise the jurors that the preliminary instructions will not necessarily be the same as the final instructions that will govern their deliberations.

29 COURT RULES SHOULD BE AMENDED TO ALLOW JURORS TO TAKE NOTES IN EVERY CASE, REGARDLESS OF THE LENGTH OR COMPLEXITY OF THE TRIAL. JURORS SHOULD BE PERMITTED TO REVIEW THEIR OWN NOTES IN THE JURY ROOM DURING RECESSES.

Current Practice

Although many judges in the state already allow jurors to take notes during trial, the practice is not universal. Jurors who take notes remember the evidence more accurately, apply the evidence to the law more accurately, are more attentive during trial, and are more satisfied with jury service.

Court Rules

Court rules currently allow jurors to take notes with the permission of the trial judge. These rules should be amended to allow jurors to take notes in every case.

Procedures for Taking Notes

The judge should instruct jurors using applicable pattern jury instructions. These instructions caution jurors about proper procedures for taking notes, about the importance of not allowing other jurors to see the notes before deliberations, and about notes not necessarily being more accurate than the memory or notes of other jurors. The court rules state that the notes should be destroyed immediately after the verdict is rendered.

33

IN EVERY CASE, JURORS SHOULD BE PERMITTED TO SUBMIT WRITTEN CLARIFYING QUESTIONS TO WITNESSES, SUBJECT TO CAREFUL JUDICIAL SUPERVISION. THE DECISION OF WHETHER TO PERMIT A QUESTION RESTS WITH THE JUDGE, ALTHOUGH COUNSEL RETAIN THE RIGHT TO OBJECT TO THE SCOPE OR CONTENT OF ANY SPECIFIC QUESTION. JURORS ARE NOT PERMITTED TO ASK ORAL QUESTIONS. THE RULES OF CIVIL PROCEDURE AND CRIMINAL PROCEDURE SHOULD BE AMENDED ACCORDINGLY.

Allowing Jurors to Propose Questions for Witnesses

Jurors should be allowed to ask questions during civil and criminal trials, subject to careful judicial supervision. Permitting jurors' questions acknowledges the importance of the role of jurors as active learners and active participants in the search for the truth, promotes efforts to focus on the merits of a case rather than speculation, and avoids the real possibility of an erroneous verdict based on confusion or misunderstanding.

Cautionary Instructions

The procedure must include a number of safeguards. Before testimony begins, the court should instruct the jury that:

1. The sole purpose of jurors' questions is to clarify the testimony, not to express any opinion about it or to argue with the witness;
2. Jurors are to remember that they are not advocates and must remain neutral fact finders;
3. Jurors are to submit questions in writing, without discussion with fellow jurors, and are to leave them unsigned; oral questions are not allowed;
4. There are some questions that the court will not ask, or will not ask in the form that a juror has written, because of the rules of evidence or other legal reasons or because the question is expected to be answered later in the case;
5. Jurors are to draw no inference if a question is not asked—it is no reflection on either the juror or the question;
6. Jurors are not to reveal to other jurors a question that was not asked by the judge or speculate as to its answer or why it was not asked; and
7. Jurors are not to interpret this instruction as meaning that the court is encouraging jurors' questions.

Procedures

The court should take the following steps when allowing jurors to propose questions:

1. At the conclusion of each witness's testimony, the court asks if jurors have written questions, which are brought to the judge;
2. Outside the presence of the jury, counsel are given the opportunity to make objections to the question or to suggest modifications to the question, by passing the written question between counsel and the court during a side-bar conference or by excusing jurors to the jury room;
3. The judge asks the question of the witness;
4. Counsel are permitted to ask appropriate follow-up questions; and
5. The written questions are made part of the record.

This recommendation is drawn primarily from American Bar Association standards, the recommendation of the National Center for State Courts, the Federal Judicial Center's Manual for Complex Litigation, and an Arizona rule of civil procedure, which was adopted in 1995 as part of wide-ranging jury reforms in that state.

Benefits of Allowing Jurors to Propose Questions

Judges and attorneys who have used this procedure report that the great majority of juror questions are serious, concise, and relevant to the issues of the trial. Counsel also find the questions to be a useful gauge of how clearly they are explaining their case. Jurors who have been permitted to ask questions indicate the procedure kept them engaged in the proceeding and gave them greater satisfaction with jury service. Studies verify that the advantages to jurors and the trial as a whole outweigh the feared risks.

As the courts have observed, in the context of complex cases or complicated testimony,

> [J]uror-inspired questions may serve to advance the search for truth by alleviating uncertainties in the jurors' minds, clearing up confusion, or alerting the attorneys to points that bear further elaboration. Furthermore, it is at least arguable that a question-asking juror will be a more attentive juror.

United States v. Sutton, 970 F.2d 1001, 1005 n.3 (1st Cir. 1992). All federal appeals courts that have considered the

issue and a significant number of state appellate courts have held that trial courts may permit jurors to submit questions to witnesses.

Concern Raised in the Pattern Jury Instructions

In Washington, both civil and criminal pattern jury instructions provide for written questions by jurors. The Comment to both instructions indicates, however, that while the rules of evidence neither explicitly allow nor disallow the practice of permitting jurors to question witnesses, the procedure should not be encouraged because it usually interrupts the trial.

This concern is largely alleviated by the cautionary instruction and procedures outlined above. Moreover, many of the questions posed by jurors can be handled in a manner that is even less time-consuming than a side-bar conference. The more routine questions can easily be addressed by passing the note from the judge to counsel, with each writing down their reactions on the note.

Concerns Raised in the Case Law

The Washington Court of Appeals has explicitly disapproved of the practice, but has not found that it constitutes reversible error. In *State v. Munoz*, *State v. Monroe*, and *State v. Walker*, Division I of the Court of Appeals has consistently observed that the active solicitation of juror questions is inappropriate. In each of these three cases, the court held that the court's solicitation of questions was not error of constitutional magnitude.

The *Monroe* court disapproved of the practice because of a number of potential risks: (1) questions can act as improper communication between jury and counsel and generally favor the prosecutor because a question signals the jurors' doubts and perceived weaknesses in the State's case; (2) a juror's question might provide "mental reactions" in other jurors, giving the question undue influence over the jury as a whole; (3) jurors may place undue significance on answers to questions by an influential juror; (4) one or more jurors may dominate the questioning process; and (5) questioning may cause jurors to begin the deliberative process before they have heard all the evidence.

Many of these concerns are minimized by using the cautionary instruction and procedures outlined above. The instruction cautions jurors about the proper purpose for their questions. Moreover, jurors are instructed at the beginning of the trial to withhold judgment until all evidence has been presented.

Conclusion

We believe that the experience in federal and state courts around the country confirms that juror questions are an important component of the truth-finding process. The

recommended preliminary cautionary instruction to the jury and the controlled procedures described here address due process concerns. Because the Court of Appeals has disapproved the use of juror questions, we recommend that both the rules of civil procedure and criminal procedure be amended to authorize the procedure.

35 TO THE GREATEST EXTENT FEASIBLE, EACH JUROR SHOULD BE GIVEN A COPY OF THE JURY INSTRUCTIONS BEFORE ORAL INSTRUCTION BY THE COURT.

Copies of Instructions for Each Juror

Giving a copy of the instructions to each juror before instruction by the court and argument of counsel substantially aids jurors' understanding of the instructions individually and as a whole. Increased comprehension of the instructions allows jurors to relate the instructions to the facts more quickly, thus expediting deliberations. The American Bar Association and New York Bar Association recommend the practice. Three studies reported four advantages to providing each juror with his or her own copy of instructions before oral instruction by the court and final arguments by counsel:

1. Jurors experienced less confusion about the instructions.
2. Jurors reported deliberations were aided because of the individual copies.
3. Jurors had fewer questions about the instructions during deliberations.
4. Jurors were more confident in their verdict.

Short Trials

In a very short trial having few instructions, it may not be practical or necessary to provide jurors with individual copies.

37 WASHINGTON'S PATTERN JURY INSTRUCTIONS SHOULD PROVIDE JURORS WITH SUGGESTED DELIBERATION PROCEDURES. THE SUGGESTED PROCEDURES SHOULD INCLUDE SELECTING A PRESIDING JUROR, ORGANIZING THE DISCUSSION, ENCOURAGING FULL PARTICIPATION BY ALL JURORS, HANDLING DISAGREEMENTS, AND TAKING VOTES.

Group Decision-Making Procedures

Many jurors are unfamiliar with group decision-making procedures. They do not know which procedures are more likely to further, and which are more likely to inhibit, their collaborative search for the truth in the evidence. They do not know that taking a vote early in their deliberations can polarize the jury and inhibit their open-minded discussion of the evidence. They do not know how to set up their discussion so that each juror fully participates and the discussion still stays on track. It is therefore not surprising that research shows that jurors spend up to one-quarter of their time trying to get organized.

Procedures in Jury Instructions

Judges can assist jurors by including in their final instructions some suggested, but not dictated, procedures for their deliberations. Other jury reform groups have made similar recommendations.

Sample Jury Instruction

Appendix 6 contains a sample instruction that incorporates instructions being developed elsewhere. We recommend that an instruction along these lines be included in Washington's pattern jury instructions.

39

THE FINAL JURY INSTRUCTIONS SHOULD EXPLAIN THE PROCEDURES FOR REQUESTING CLARIFICATION OF INSTRUCTIONS. THE JUDGE SHOULD ADVISE THE JURY TO SUBMIT ANY QUESTIONS ABOUT INSTRUCTIONS IN WRITING TO THE BAILIFF.

WHEN A JURY QUESTION ARISES DURING DELIBERATIONS, THE QUESTION SHOULD BE NUMBERED, DESIGNATED BY TIME AND DATE, FILED AND MADE A PART OF THE RECORD. THE JUDGE SHOULD NOTIFY THE PARTIES OR THEIR COUNSEL THAT THE JURY HAS SUBMITTED A QUESTION AND DIRECT THEM TO MEET IN THE COURTROOM OR BY TELEPHONE. THE JUDGE SHOULD READ THE QUESTION AND SOLICIT COMMENTS FROM COUNSEL REGARDING THE APPROPRIATE RESPONSE. THE RESPONSE AND ANY OBJECTIONS TO IT SHOULD BE ENTERED ON THE RECORD.

THE JUDGE SHOULD, AFTER CONSULTING WITH COUNSEL, RESPOND TO ALL JURY QUESTIONS, EVEN IF THE RESPONSE IS NO MORE THAN A DIRECTIVE FOR THE JURY TO CONTINUE ITS DELIBERATIONS. IF THE JUDGE PROVIDES ANY ADDITIONAL INSTRUCTION IN RESPONSE TO A JURY QUESTION, THE JUDGE SHOULD REMIND THE JURY NOT TO EMPHASIZE ANY PARTICULAR INSTRUCTION OR PART OF ANY INSTRUCTION, BUT RATHER TO CONSIDER THE INSTRUCTIONS AS A WHOLE. RESPONSES TO JURY QUESTIONS ON ANY POINT OF LAW SHOULD BE DELIVERED TO THE JURY IN WRITING. THE JUDGE SHOULD ENSURE THAT ANY ADDITIONAL INSTRUCTIONS ARE NOT COERCIVE OR UNFAIRLY PREJUDICIAL TO EITHER PARTY.

THE ABOVE PROCESS SHOULD BE MANDATED BY COURT RULE.

For a related discussion of this issue, see the accompanying Recommendations 38 and 40.

40

WHEN A JURY QUESTION ARISES DURING DELIBERATIONS REGARDING THE EVIDENCE, THE JUDGE SHOULD NOTIFY THE PARTIES OR THEIR COUNSEL OF THE QUESTION. THE JUDGE SHOULD READ THE QUESTION AND SOLICIT COMMENTS REGARDING THE APPROPRIATE RESPONSE. THE RESPONSE AND ANY OBJECTIONS TO IT SHOULD BE MADE A PART OF THE RECORD. THIS PROCESS SHOULD BE MANDATED BY COURT RULE.

THE JUDGE SHOULD, AFTER CONSULTING WITH THE PARTIES OR COUNSEL, RESPOND TO ALL JURY QUESTIONS, EVEN IF THE RESPONSE IS NO MORE THAN A DIRECTIVE TO RELY UPON THEIR MEMORIES OF THE EVIDENCE. THE COURT MAY ALLOW THE JURY TO REVIEW EVIDENCE (E.G., REPLAYING AUDIO OR VIDEO TAPES) IF SUCH REVIEW IS NOT UNFAIRLY PREJUDICIAL TO EITHER PARTY. THE COURT MAY GRANT A JURY'S REQUEST TO REHEAR OR REPLAY TRIAL TESTIMONY, BUT SHOULD DO SO IN A WAY THAT IS LEAST LIKELY TO CONSTITUTE A COMMENT ON THE EVIDENCE AND THAT MINIMIZES THE POSSIBILITY THAT JURORS WILL GIVE UNDUE WEIGHT TO THE SELECTED TESTIMONY.

Reviewing Evidence During Deliberations

Court rules provide that when the jury retires for deliberation, it must take with it the written instructions given, all exhibits received in evidence (except testimonial exhibits such as depositions), and the verdict form(s). However, neither court rules nor the rules of evidence specifically address the jury's ability to review evidence after deliberations have begun, although exhibits taken to the jury room generally may be used by the jury as it sees fit. In general, the court has discretion to allow an admitted, non-testimonial exhibit to go to the jury room, so long as it is not unduly prejudicial. (See references.)

Requests from Jurors to Rehear or Replay Testimony

Washington's case law has not yet addressed whether a trial judge may grant a deliberating jury's request to rehear or replay particular trial testimony. Concerns sometimes are expressed that granting these requests may be interpreted as an unconstitutional comment on the evidence or that jurors might place undue weight on the selected testimony. The general rule in other states, however, is that trial judges have discretion to grant these requests. This general rule includes cases from states in which judges are prohibited from commenting on the evidence.

Safeguards When Allowing Jurors to Rehear or Replay Testimony

The Commission believes jurors should be allowed to rehear or replay testimony as long as appropriate safeguards are in place. Judges should give a cautionary instruction advising jurors to keep in mind all the evidence in the case, not just the testimony being reheard or replayed, and advising that the judge is not making any comment on the value or credibility of the testimony at issue. The testimony should be read or played to the jurors in the courtroom and should not be given to the jurors in written form to take to the jury room. Because of concerns over commenting on the evidence, the judge ordinarily should not select additional testimony for the jury to hear along with the requested testimony.

Although judges now have discretion to allow this practice, the Commission recommends that a court rule be adopted. A more complete protocol should be developed as part of the implementation of this recommendation.

For a discussion of other issues related to this recommendation, see the accompanying Recommendations 38 and 39.

41

WHEN DELIBERATING JURORS IN A CIVIL CASE REPORT THAT THEY CANNOT REACH A VERDICT, THE JUDGE SHOULD TAKE ADDITIONAL STEPS AFTER CONFIRMING THAT THE JURY IS, IN FACT, DEADLOCKED. THE JUDGE SHOULD INVITE THE JURY TO STATE, IN WRITING, THE POINTS OF LAW OR EVIDENCE UPON WHICH IT CANNOT AGREE AND DESIRES HELP. THE JUDGE SHOULD DISCUSS THE JURY'S RESPONSE WITH COUNSEL BEFORE DECIDING HOW TO PROCEED. THE JUDGE CAN PROVIDE ADDITIONAL INSTRUCTIONS, PERMIT ADDITIONAL CLOSING ARGUMENTS, REREAD OR REPLAY TESTIMONY, REOPEN THE TRIAL FOR MORE EVIDENCE, OR ALLOW A COMBINATION OF THESE. IN COMMUNICATING WITH JURORS, THE JUDGE MUST AVOID ANY APPEARANCE OF COERCING A VERDICT.

Jury at an Impasse

Traditionally, when a deliberating jury in a civil case reports that it is unable to reach a verdict, the trial judge asks a series of questions, to be answered "yes" or "no," aimed at discovering whether the jury is actually deadlocked. After the jury confirms it is deadlocked, the court declares a mistrial, usually without further dialogue with jurors and without offering any assistance. The trial lawyers are left to wonder about, and perhaps later investigate, what caused the hung jury and what they might do differently at a retrial.

Offering Assistance

Once the court has determined that the jury is deadlocked, the judge should ascertain reasons for the impasse before declaring a mistrial. Once the jury has articulated its difficulties, the judge should take appropriate steps to assist the jury. Such steps may include clarifying instructions, allowing additional arguments, rereading or replaying testimony, and allowing supplemental evidence where appropriate. See Appendix 7 for a sample instruction to use in offering assistance to a jury at an impasse.

Supplemental Evidence

The Commission recognizes that reopening a trial to allow supplemental evidence and argument is a departure from common practice. Concern that this gives the plaintiff an unfair second opportunity is unfounded. At the point the court determines that the jury is deadlocked, the plaintiff has the opportunity for a retrial. This practice of reopening for additional evidence and argument is likely to be used infrequently, offers the opportunity to respond to jurors questions in the first trial, and potentially saves the time

and expense of a retrial.

Jury's Request to Rehear or Replay Testimony

For a discussion of the safeguards that trial judges should use when allowing jurors to rehear or replay testimony, see Recommendation 40.

Caution

It is important to be careful in all comments to the jurors to avoid any appearance of coercion or pressure.

Civil Cases Only

This recommendation is limited to civil cases. The Jury Commission considered, but rejected, extending this recommendation to criminal cases.

APPENDIX H CONSUMER PROTECTION ACT *PER SE* VIOLATIONS

SUBJECT	RCW AS TO DECLARATION OF UNFAIR OR DECEPTIVE ACT IN TRADE OR COMMERCE	RCW AS TO DECLARATION REGARDING PUBLIC INTEREST:	RCW AS TO DECLARATION OF NOT REASONABLE:
Academic credentials (granting/claiming)	28B.85.220		
Adoption advertising	26.33.400(3)	26.33.400(3)	
Adult family home, unlicensed	70.128.058	70.128.058	70.128.058
Airbags—motor vehicle	46.37.640	Laws of 2016, Ch. 214, § 6	Laws of 2016, Ch. 214, § 6
Animals, research	19.86.145 (referring to RCW 9.08.070 and 16.52.220)		
Athlete agents	RCW 19.225.120	RCW 19.225.120	RCW 19.225.120
Auctions	18.11.260	18.11.260	
Automotive repair	46.71.070	46.71.070	46.71.070
Automatic dial answer devices	80.36.400(3)	Laws 1986, Ch. 281, § 1	
Bail bond agents	18.185.210		18.185.210
Biometric identifiers	19.375.030	19.375.030	19.375.030
Body art, body piercing, tattooing	18.235.130; 18.300.140	18.235.130; 18.300.140	18.235.130; 18.300.140
Breastfeeding, public	49.60.030; 49.60.215	49.60.030; 49.60.215	49.60.030; 49.60.215
Business opportunity fraud	19.110.170		
Business telephone listings	19.160.020	19.160.020	19.160.020
Camping clubs	19.105.405 19.105.500		
Cathinone/methcathinone	69.50.460	69.50.460	69.50.460
Cemetery sales	68.05.330		
Chain distributor (pyramid) schemes	19.102.020		
Charitable solicitations	19.09.340	19.09.010	

CONSUMER PROTECTION ACT PER SE VIOLATIONS

SUBJECT	RCW AS TO DECLARATION OF UNFAIR OR DECEPTIVE ACT IN TRADE OR COMMERCE	RCW AS TO DECLARATION REGARDING PUBLIC INTEREST:	RCW AS TO DECLARATION OF NOT REASONABLE:
Check cashers	31.45.190	31.45.190	
Cigarette sales	19.91.300		
Cigarette tax	82.24.035		
Collection agencies	19.16.440		
Colleges	28B.85.180	28B.85.180	
Commercial e-mail (spamming)	19.190.030	19.190.030	19.190.030
Community solar companies	82.16.170	82.16.170	82.16.170
Construction liens, coercion	60.04.035	60.04.035	60.04.035
Consumer credit reporting agencies	19.182.150	19.182.150	19.182.150
Consumer leases	63.10.050	63.10.050	63.10.050
Consumer loans	31.04.208	31.04.208	31.04.208
Consumer rebates	19.315.030	19.315.030	19.315.030
Continuing care retirement communities	18.390.080	18.390.080	18.390.080
Contractor registration	18.27.350	18.27.350	
Cord blood banks	70.54.222	70.54.222	70.54.222
Cosmetologists/hair designers/barbers/manicurists/estheticians	18.16.250	18.16.250	18.16.250
Credit reporting agencies (Fair Credit Reporting Act)	19.182.150; 19.182.170	19.182.150; 19.182.170	19.182.150; 19.182.170
Credit service agencies	19.134.070(5)		
Debt adjusting	18.28.185		
Deed of trust sales	61.24.135		
Discrimination/Civil Rights	49.60.030(3)	49.60.030(3)	49.60.030(3)
Elder and vulnerable adult referral agencies	18.330.140	18.330.140	
Electric utilities-customer information-privacy	19.29A.110	19.29A.110	19.29A.110
Electronic communications devices (RFID/facial recognition)	19.300.030	19.300.030	19.300.030
Electronic mail, commercial (generally)	19.190.100	19.190.100	19.190.100
Electronic signatures	19.34.100		
Electronic text messaging, commercial	19.190.060, 19.190.070	19.190.060, 19.190.070	19.190.060, 19.190.070

CONSUMER PROTECTION ACT PER SE VIOLATIONS

SUBJECT	RCW AS TO DECLARATION OF UNFAIR OR DECEPTIVE ACT IN TRADE OR COMMERCE	RCW AS TO DECLARATION REGARDING PUBLIC INTEREST:	RCW AS TO DECLARATION OF NOT REASONABLE:
Embalming and funerals	18.39.350		
Employment agencies	19.31.210		
Energy efficiency	70.164.060(3)	70.164.060(3)	
Enhanced services facilities (licensure)	70.97.130	70.97.130	70.97.130
Escrow funds	18.44.400		
Escrow referral fees	18.44.450	18.44.450	18.44.450
Exchange facilitators	19.310.160	19.310.160	19.310.160
Franchises	19.100.190		
Going out of business	19.178.110	19.178.110	19.178.110
Health studios	19.142.100	19.142.005	
Hearing aids	18.35.180		
Heating oil pollution liability	70.149.100		
Home care, home health, hospice services-Unlicensed	70.127.216	70.127.216	70.127.216
House-to-house-sales	49.12.310(3)	49.12.010	
Identity crimes	9.35.040	9.35.040	9.35.040
	9.35.800	9.35.800	9.35.800
Identity Information procurement (via internet)	19.190.80	19.190.80	19.190.80
Immigration assistants	19.154.090	19.154.090	
Insurance	48.30.010(2) (delegation of authority to Insurance Comm'r), 48.102.180, 48.110.140	48.01.030, 48.30A.005, 48.102.180, 48.104.010, 48.110.140	48.102.180, 48.110.140
Interest/usury	19.52.036	19.52.005	
International matchmaking	19.220.030	19.220.030	19.220.030
Kosher food labels	69.90.030		
Land development	58.19.270	58.19.270	58.19.270(1)
Lease purchase	63.19.110	63.19.110	63.19.110
Leases	62A.2A-104		
Life Settlements Act	48.102.180	48.102.180	48.102.180
Locksmith services	19.355.030	19.355.030	19.355.030
Living trusts	19.295.030	19.295.030	19.295.030
Long-term care facilities (residents' funds)	70.129.040		

CONSUMER PROTECTION ACT PER SE VIOLATIONS

SUBJECT	RCW AS TO DECLARATION OF UNFAIR OR DECEPTIVE ACT IN TRADE OR COMMERCE	RCW AS TO DECLARATION REGARDING PUBLIC INTEREST:	RCW AS TO DECLARATION OF NOT REASONABLE:
Mobile home installation and warranty	43.22.440(3) 18.27.350	43.22.440(2) 18.27.350	
Mortgage brokers	19.146.100	19.146.005 19.146.100	19.146.100
Motorsports vehicles - cancellation or return of new	46.93.170	46.93.170	
Motor vehicle broker fraud	19.116.030	19.116.010	19.116.030
Motor vehicle buyer's agent	46.70.320	46.70.320	46.70.320
Motor vehicle - recording devices	46.35.050	46.35.050	46.35.050
Motor vehicle service contract	48.96.060	48.96.005 48.96.060	
Motor vehicle "lemon law"	19.118.041(3) 19.118.120	19.118.120	
Motor vehicle sales	46.70.310	46.70.310	
Motor vehicle dealer	46.70.021	46.70.310	
Motor vehicle dealer franchise agreements	46.96.185	46.96.185	
Motor vehicle used, price disclosure	46.70.125	46.70.310	
Music advertising	19.25		
Nursing home Medicaid discrimination	74.42.055	74.42.055	
On-site sewage (arguable) additives	70.118.080	70.118.010	
Organic food labels	19.86.023		
Patent infringement - bad faith assertions	19.350.030	19.350.030	19.350.030
Performing rights societies	19.370.040		
Pet research theft	19.86.145		
Prizes and promotions	19.170.010	19.170.010	19.170.010(2)
Pyramid schemes	19.275.040	19.275.040	19.275.040
Radio communications	80.66.010		
Real estate equity	61.34.040	61.34.040	
Recreational vehicle show (temporary subagency licenses)	46.70.340	46.70.340	46.70.340
Roofing/siding contractors and sales	19.186.050	19.186.005 19.186.050	

CONSUMER PROTECTION ACT PER SE VIOLATIONS

SUBJECT	RCW AS TO DECLARATION OF UNFAIR OR DECEPTIVE ACT IN TRADE OR COMMERCE	RCW AS TO DECLARATION REGARDING PUBLIC INTEREST:	RCW AS TO DECLARATION OF NOT REASONABLE:
Security breach - personal information; data security breach notification	19.255.010(17)	19.255.010(17)	19.255.010(17)
Service contracts	48.110.140	48.110.140	48.110.140
Social workers - use of title	18.320.020	18.320.020	18.320.020
Solar modules - sale and installation tax incentives	82.16.180	82.16.180	82.16.180
Student exchanges	19.166.100	19.166.100	19.166.100
Synthetic cannabinoids	69.50.455	69.50.455	69.50.455
Tax refund loans	19.265.070	19.265.070	19.265.070
Telecommunications - Automatic dial/answer devices	80.36.400		
Telecommunications - Long distance fee disclosure	80.36.530	80.36.530	80.36.530
Telefacsimile solicitation	80.36.540(5)	80.36.540(5)	80.36.540(5)
Telephone alternative operator services	80.36.530	80.36.530	80.36.530
Telephone equipment	19.130.060	19.130.010	
Telephone listings - business (out of state florists)	19.160.010; .020	19.160.010; .020	19.160.010; .020
Telephone pay per call	19.162.010	19.162.010	19.162.010(2)
Telephone solicitation	19.158.030	19.158.010	19.158.030
Ticket sellers — internet	19.345.020	19.345.020	19.345.020
Time share sales	64.36.330; 64.36.170		
Tobacco product manufacturers (mandatory participation in Master Settlement Agreement)	70.158.060	70.158.060	70.158.060
Tobacco sales - internet and mail order	70.155.140	70.155.140	70.155.140
Travel tour operators	19.138.290	19.138.010 19.138.290	19.138.290
Unclaimed property - recovery fees	63.29.350	63.29.350	63.29.350
Unsolicited goods	19.56.030	19.56.030	19.56.030
Veterans benefit-related services	19.335.050	19.335.050	19.335.050
Viatical settlements (life insurance)	48.102.180	48.102.180	48.102.180
Vocational schools	28C.10.210	28C.10.210	

CONSUMER PROTECTION ACT PER SE VIOLATIONS

SUBJECT	RCW AS TO DECLARATION OF UNFAIR OR DECEPTIVE ACT IN TRADE OR COMMERCE	RCW AS TO DECLARATION REGARDING PUBLIC INTEREST:	RCW AS TO DECLARATION OF NOT REASONABLE:
Washington, Grown In	15.04.410(4)	15.04.410(4)	15.04.410(4)
Water companies exempt from WUTC	80.04.010		
Weatherization of rented residence	70.164.060	70.164.010 70.164.060	
Wireless phone numbers	19.250.040	19.250.040	19.250.040

See also the list of statutes cross-referenced in the Code Reviser's notes to the Consumer Protection Act, RCW Chapter 19.86, at http://app.leg.wa.gov/RCW/default.aspx?cite=19.86.

[Current as of January 2018.]

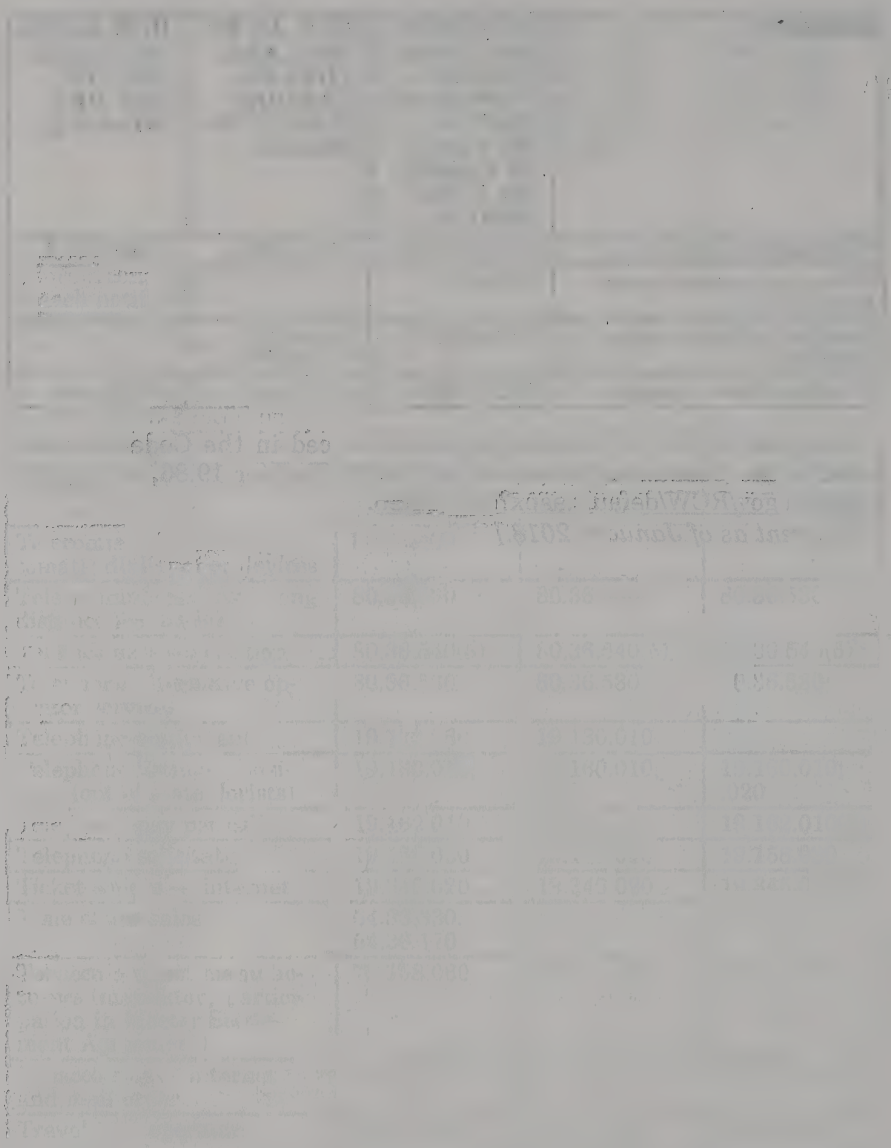


Table of Laws and Rules

CIVIL RIGHTS ACT OF 1964

Sec.	This work Instr. No.
Title VII	330.02

UNITED STATES CODE ANNOTATED

15 U.S.C.A. Sec.	This work Instr. No.
45	310.00
45(n)	310.08

28 U.S.C.A. Sec.	This work Instr. No.
1257	340.00

29 U.S.C.A. Sec.	This work Instr. No.
206(d)(1)	330.00
621 et seq.	330.00
791 et seq.	330.00
12101 et seq.	330.00

42 U.S.C.A. Sec.	This work Instr. No.
1981	330.00
1983	16.01, 35.01, 340.00, 340.01, 340.02, 340.06, 348.12
2000e et seq.	330.00
2000e	330.03
2000e(j)	330.42
2000e-2(k)	330.03
2000e-2(k)(1)(A)(i)	330.02
2000e-2(k)(1)(B)	330.02
12101	6.21, 330.00
12102	330.31

CODE OF FEDERAL REGULATIONS

29 C.F.R. Sec.	This work Instr. No.
630.2(n)(1)	330.37
1604.11(g)	330.22
1605.2	330.40

29 C.F.R. Sec.	This work Instr. No.
1630.2(n)(1)	330.37
1630.2(q)	330.37

CODE OF JUDICIAL CONDUCT

Sec.	This work Instr. No.
Canon 2.8	6.20

WASHINGTON CONSTITUTION

	This work Instr. No.
162-12-140(3)(n)	330.01
Art. I, § 7	342.05
Art. I, § 10	360.01, 365.01, 365.30
Art. 1, § 11	380.01
Art. I, § 21	301A.02
Art. IV, § 16	1.01, 6.19, 340.00, 340.01, 360.01, 365.01, 365.30
Art. I, Amend 9, § 16	150.00, 150.07

WASHINGTON REVISED CODE

Sec.	This work Instr. No.
Title 8	150.00
Title 51	21.10, 330.81
Title 62A	110.01.01, 300.00, 300.01
Ch 2.42	6.11
2.42.050	6.11
Ch 2.43	6.11
2.43.050	6.11
4.16.040	107.00
4.16.080	107.00
4.16.080(3)	107.00
4.18.020	110.08
4.20.010	31.00, 31.01, 31.02.01, 31.03.01, 31.03.02, 31.06.01, 32.04, 34.02
4.20.020	14.03, 31.00, 31.01, 31.01.01, 31.02.01, 31.03.01, 31.03.02, 32.04
4.20.046	30.06, 31.00, 31.01, 31.01.01, 31.01.02, 31.02.01, 31.03.01, 31.06.01, 34.02
4.20.060	31.00, 31.01, 31.01.01, 31.01.02, 31.02.01, 31.03.01, 31.06.01
Ch 4.22	110.00, 110.31.01.01
4.22.005	11.01, 12.08, 14.02, 33.01, 33.02, 33.03, 110.02.03, 110.10, 110.31.01, 110.31.01.01, 110.31.02
4.22.010	120.04
4.22.015	11.01, 12.01, 13.01, 14.02, 16.03, 33.01, 33.02, 33.03, 41.04, 110.00, 110.02.03, 110.02.04, 110.10, 110.30.02, 110.31.01, 110.31.01.01, 110.31.01.02, 110.31.02, 380.06
4.22.020	11.04, 11.04.01, 11.05, 11.06, 31.02.01, 31.06.01, 32.04, 32.06.01
4.22.030	15.04
4.22.040	11.01
4.22.050	11.01
4.22.060	11.01
4.22.070	11.01, 11.04, 15.04, 41.04, 45.20, 45.21, 45.23, 45.24, 45.25, 45.26, 45.27, 50.20, 50.21, 110.00, 110.02.03, 110.02.04, 110.30.02, 110.31.01.01, 110.31.01.02, 110.31.02, 380.06
4.22.070(1)	10.05, 11.01, 11.03, 11.04, 15.04, 21.10, 41.04, 45.20, 45.22, 45.23, 45.24, 45.25, 45.26, 45.27, 50.00
4.22.070(1)(a)	11.01, 50.20, 50.21
4.22.070(1)(b)	11.01, 41.04, 110.30.02
4.22.070(2)	11.01
4.22.070(3)	41.04

WASHINGTON REVISED CODE—Continued

Sec.	This work Instr. No.
4.24.010	30.06, 31.00, 31.01, 31.02.01, 31.03.01, 31.03.02, 31.06.01, 32.06.01
4.24.040	380.04
4.24.200	120.04
4.24.210	120.04, 120.06, 120.07
4.24.210(4)	120.07
4.24.264	10.07
4.24.290	105.01, 105.02.01, 105.03, 105.04
4.24.300	10.07, 14.01
4.24.420	16.01, 16.02, 21.08
4.44.270	2.14, 6.03
4.44.280	6.02
4.44.380	1.11, 45.00, 360.20
4.44.410	45.00
4.44.420	45.00
4.44.440	45.00
4.44.460	45.00
4.48.210	380.00
4.56.060	303.02
4.56.070	303.02
4.56.250	30.01.01, 32.06.01, 45.20, 110.31.01, 110.31.01.01, 110.31.02
4.56.250(1)	30.00, 32.06.01
4.56.250(1)(a)	30.00, 30.01.02, 30.07.01, 30.08.01, 30.09.01, 30.10, 30.11, 30.12, 30.13, 30.14, 30.15, 30.16
4.56.250(1)(b)	30.00, 30.01.03, 30.05, 30.06, 30.08.01, 30.09.01
4.56.250(2)	45.20
4.56.260	30.01.04, 32.06.01, 34.02, 45.20, 45.21, 45.22, 45.23, 45.24, 45.25, 45.26, 45.27, 110.30.01
5.40.050	12.01, 60.01.01, 60.03, 70.03.02, 70.03.03, 105.02.02, 130.06, 370.07, 370.12
5.40.060	12.01, 12.01.01, 16.03, 16.04, 16.04.01, 16.05, 21.09, 72.03, 370.07, 370.12
5.40.060(1)	12.01, 16.03, 16.04, 16.04.01
5.40.060(2)	12.01, 16.03
5.60.030	6.08
7.22.070(1)	110.30.02
7.28.190	45.00
7.42.010	380.04
Ch 7.48	380.00, 380.04
7.48.010	380.00, 380.01.01
7.48.020	380.00
7.48.120	380.00, 380.01, 380.01.01, 380.05
7.48.130	380.02
7.48.140	380.00, 380.01, 380.01.01, 380.02
7.48.150	380.02
7.48.210	380.00, 380.02
7.48.220	380.00
7.48.300 to .310	380.00
Ch 7.48A	380.04
Ch 7.64	45.00
Ch 7.70	105.06
7.70.010	105.02.02, 105.04, 105.06
7.70.020	105.01, 105.02.01
7.70.030	105.03, 105.04, 105.06
7.70.030(3)	105.04
7.70.040	105.01, 105.02.02, 105.03, 105.08
7.70.040(1)	105.01
7.70.040(2)	110.04
7.70.050	105.04, 105.05
7.70.050(1)	105.04
7.70.050(1)(a) and (c)	105.04
7.70.050(2)	105.04
7.70.050(3)	105.04
7.70.050(4)	105.04
7.70.060	105.04, 105.05
7.70.065	105.04
7.70.080	2.13
7.70.090	10.07, 105.02.02
Ch 7.72	30.06, 110.00, 110.03, 110.07
7.72.010	110.04, 110.20, 110.20.01, 110.21, 110.21.01, 110.21.02, 110.22, 110.22.01, 110.23, 110.23.01, 110.23.02, 110.30.01, 110.30.02, 110.31.01, 110.31.01.01, 110.31.02
7.72.010(1)	110.04
7.72.010(2)	110.04
7.72.010(3)	110.00, 110.02.02
7.72.010(4)	110.00

WASHINGTON REVISED CODE—Continued

Sec.	This work Instr. No.
7.72.010(6)	110.30.01
7.72.020	110.03
7.72.020(1)	110.00, 110.10
7.72.030	110.01, 110.02
7.72.030(1)	110.02, 110.03, 110.03.01
7.72.030(1)(a)	110.02, 110.04
7.72.030(1)(b)	110.03
7.72.030(1)(c)	110.03.01
7.72.030(2)	110.01, 110.01.01
7.72.030(2)(a)	110.01
7.72.030(2)(b)	110.01.01
7.72.030(3)	110.01, 110.01.01, 110.02, 110.03
7.72.030(1) and (2)	110.30.01
7.72.040(1)	110.07
7.72.040(2)	110.07
7.72.050(1)	110.01, 110.02
7.72.050(2)	110.05, 110.06
7.72.060	110.08
7.72.060(1)	110.08
7.72.060(1)(a)	110.08
7.72.060(1)(b)	110.08
7.72.060(2)	110.08
7.72.060(3)	110.08
7.72.060(1) and (2)	110.08
7.72.060(b)	110.08
7.73.030(2)(b)	110.01.01
Ch 8.04	150.05
8.04.080	150.07
8.04.092	150.05
8.04.110	150.05, 150.06
8.04.140	150.05
8.08.040	150.07
8.08.050	150.06
8.12.100	150.05
8.12.120	150.05
8.12.140	150.06
8.12.150	150.05
8.12.190	150.07
8.20.080	150.05
8.20.110	150.05
8.25.070	150.03
8.25.075	150.03
8.25.220	150.07
8.26.010(5)	150.03
8.26.035	150.03
8.28.040	150.03
9.46.295	380.04
9.66.010	380.00
9.91.010	330.01
9.94A.030	360.05
9A.04.110(29)	100.07
9A.16.020(5)	100.07
9A.44.070	365.16
9A.44.080	365.16
9A.44.100(1)(b)	365.16
9A.56.010(6)	351.04
9A.56.020(1)(b)	351.04
Ch 10.77	360.11
10.77.086	360.21, 360.22
10.77.086(4)	360.05
11.02.005	31.01
11.04.015	31.01.01
14.08.030(4)	380.04
16.08.010	380.04
16.08.040	380.04
16.24.110	380.04
17.28.170	380.04
17.28.185	380.04
18.11.260	310.03
18.71.210	105.02.01
18.185.210	310.03
19.16.440	310.03
19.27.031	380.00
19.36.010	301A.01
Ch 19.40	160.01
Ch 19.86	33.03, 310.00, 310.02, 310.03, 320.00
19.86.010	310.09
19.86.020	310.00, 310.01, 310.06, 310.08
19.86.020 to .080	320.06
19.86.080	310.00
19.86.090	310.00, 310.06, 320.00
19.86.093	310.01, 310.04, 310.05
19.86.140	310.00
19.86.170	320.04
19.86.920	310.01, 310.02, 310.08
19.100.190	310.03
Ch 19.108	351.01

WASHINGTON REVISED CODE—Continued

Sec.	This work Instr. No.
19.108.010	351.02
19.108.010(1)	351.04
19.108.010(2)	351.03
19.108.010(2)(b)	351.03
19.108.010(4)	351.05
19.108.010(4)(a)	351.05
19.108.010(4)(b)	351.08
19.108.030	351.01
19.108.030(1)	351.01
19.108.030(2)	351.01
19.110.170	310.03
19.134.070(5)	310.03
19.158.010	310.03
19.158.030	310.03
19.170.010	310.03
19.170.010(2)	310.00, 310.02, 310.03
19.182.150	310.00, 310.02, 310.03
19.250.040	310.03
19.275.040	310.03
25.05.005(6)	50.12
25.05.100(1)	50.13
25.05.100(2)	50.14
25.05.120(1)	50.13
25.05.135(2)	50.14
26.04.010	32.04
Ch 26.16	41.03
26.33.400(3)	310.03
26.50.015	41.01
Ch 26.60	11.04.01
26.60.015	41.03
31.45.190	310.03
Ch 35.02	140.04
35.02.180	140.04
35.02.220(2)	140.04
Ch 35.13	140.04
35.58.320	150.05
35.88.080	380.04
36.86.040	140.01
41.04.007	330.01
Ch 42.40	330.05
43.44.110	130.06
46.04.040	71.02
46.04.080	70.02.04, 70.02.05
46.04.160	70.03.05
46.04.220	70.03.05
46.04.290	70.03.05
46.04.470	70.02.04, 70.02.05
46.04.500	70.03.05
46.08.080	10.07
46.37.184	71.02
46.37.190	71.01, 71.02
46.37.194	71.02
46.37.380	71.01, 71.02
46.55.240	380.04
46.61.030	70.03.04, 71.04
46.61.035	71.01, 71.02
46.61.035(2)	71.01
46.61.035(4)	71.01
46.61.145	70.04
46.61.180	70.02
46.61.185	70.02.01
46.61.190	70.02.02, 70.02.03
46.61.205	70.02.05
46.61.210	71.01, 71.02, 71.05
46.61.210(1)	71.01
46.61.235	70.03
46.61.235(1)	70.03.02
46.61.235(2)	70.03.03
46.61.240(1)	70.03.04, 71.04
46.61.365	70.02.04
46.61.400	70.05
46.61.502	12.01, 16.03, 16.04, 16.04.01, 16.05
46.61.502(1)(b)	16.05
46.61.502(4)(b)	16.05
46.61.506(1)	16.05
46.61.560	70.04
46.61.687	70.08
46.61.687(4)	70.08
46.61.688(3), (4), and (6)	70.08
46.61.688(6)	70.08
46.61.750(2)	70.09
46.61.750 to .780	70.09
46.61.755(1)	70.09
46.61.755(2)	70.09
46.64.015	342.05
46.70.310	310.03
46.71.070	310.00, 310.02, 310.03
47.32.130	380.01.01
47.36.020	140.01

WASHINGTON REVISED CODE—Continued

Sec.	This work Instr. No.
47.36.110	70.02.02
47.36.200	71.04
47.41.070	380.04
47.52.027	71.04
47.52.041	151.04
47.60.220	100.02
48.01.030	320.00, 320.01, 320.02
48.30.010	320.04
48.30.010(1)	320.06
48.30.010(2)	320.06
48.30.010(7)	320.06.01
48.30.015	320.06.01
48.30.015(4)	320.06.01
Ch 49.44	330.00
49.44.090	330.00, 330.01, 330.04, 330.23
Ch 49.46	330.00
49.58.020	330.00
Ch 49.60	35.01, 330.00, 330.01, 330.05, 330.21, 330.22, 330.31.01, 330.33, 330.51, 330.52, 330.81
49.60.020	330.00
49.60.030	330.01
49.60.030(2)	330.33, 330.52, 330.81
49.60.030(3)	310.00, 310.02, 310.03
49.60.040	330.00, 330.01
49.60.040(7)	330.00, 330.31, 330.33
49.60.040(7)(a) to (c)	330.31
49.60.040(7)(b)	330.31, 330.31.01
49.60.040(7)(c)	330.31.01
49.60.040(7)(d)	330.33, 330.34
49.60.040(7)(d)(i)	330.33
49.60.040(7)(d)(ii)	330.33
49.60.040(7)(e)	330.33
49.60.040(11)	330.00
49.60.040(15)	330.01
49.60.040(25)	330.01, 330.21, 330.23
49.60.040(26)	330.01
49.60.174	330.21
49.60.174(1)	330.23
49.60.180	330.00, 330.31
49.60.180(1)	330.00, 330.04
49.60.180(2)	330.01, 330.32
49.60.180(3)	330.01, 330.21, 330.23, 330.81
49.60.180(4)	330.04
49.60.190	330.00
49.60.200	330.00
49.60.205	330.04, 330.23
49.60.210(1)	330.05
49.60.210(2)	330.05
49.60.220	330.00
51.04.010	155.05
51.04.020	155.04
51.08.140	155.06, 155.30
51.08.160	155.07, 155.07.01
51.32.080	155.08, 155.08.01
51.32.080(2)	155.08
51.32.080(3)	155.08, 155.11
51.32.080(5)	155.21
51.32.090	155.02.01
51.32.160	155.11
51.32.180	155.08
51.36.010	155.31
51.52.115	155.01.01, 155.02, 155.02.01, 155.03
53.08.010	150.05
53.25.190	150.05
54.16.020	150.05
57.08.005	150.05
Ch 59.18	130.00
59.18.040	130.06
59.18.060	130.06
59.18.060(1) to (13)	130.06
59.18.060(1)	130.06
59.18.060(3)	130.02
59.18.060(12)(a)	130.06
59.18.090	130.06
59.18.230	130.00
59.18.360	130.00
63.10.050	310.03
64.06.013	165.00
64.36.170	310.03
64.36.330	310.03
66.20.010(12)	370.12
66.20.180	370.07
66.20.190	370.07, 370.11
66.20.210	370.07
66.20.210(1)	370.11

WASHINGTON REVISED CODE—Continued

Sec.	This work Instr. No.
66.44.200	60.03, 370.01
66.44.210	370.07
66.44.270(1)	60.03, 370.07, 370.12
66.44.270(2)	370.07, 370.12
66.44.310	370.07
67.16.060	380.04
70.44.060	150.05
70.84.040	70.01
Ch 71.05	360.00, 360.01, 360.11
71.05.012	360.13.01
71.05.020	360.11, 360.12, 360.13, 360.23
71.05.020(3)	360.13
71.05.020(27)	360.05.03
71.05.020(29)	360.10
71.05.020(30)	360.05.02
71.05.020(19) and (48)	360.13.01
71.05.217	360.14
71.05.235(2)	360.21
71.05.245	360.13.01
71.05.280	360.04, 360.05, 360.05.03, 360.21, 360.23
71.05.280(3)	360.05, 360.21
71.05.280(3)(b)	360.05
71.05.280(5)	360.04, 360.05, 360.05.03, 360.23
71.05.290(3)	360.21
71.05.300	360.14
71.05.310	360.06, 360.14
71.05.320	360.05, 360.05.01, 360.05.03, 360.22, 360.23
71.05.320(1)	360.04, 360.05, 360.21
71.05.320(2)	360.04, 360.05, 360.05.02, 360.22
71.05.320(2)(a) through (d)	360.13
71.05.320(2)(b)	360.22
71.05.320(2)(c)	360.05, 360.22
71.05.320(3)	360.05, 360.05.02
71.05.320(3)(b)	360.05
71.05.320(4)	360.05, 360.05.01
71.05.320(4)(b)	360.05
71.05.320(4)(c)	360.05
71.05.360	360.14
71.05.585	360.05.02
71.05.620	360.01
Ch 71.09	360.00, 360.05, 365.00, 365.01, 365.11
71.09.020	365.10, 365.12, 365.12.01, 365.13, 365.14, 365.15, 365.16, 365.30
71.09.020(7)	365.14
71.09.030	365.10, 365.15, 365.30
71.09.040	365.00
71.09.050	365.00
71.09.060	365.00, 365.10, 365.11
71.09.060(1)	365.10, 365.11, 365.21
71.09.060(2)	365.16
71.09.070	365.00
71.09.090	365.00, 365.31, 365.33, 365.34, 365.37
71.09.090(3)	365.35, 365.36
71.09.090(3)(c)	365.34
71.09.092	365.00, 365.32
71.09.094	365.00, 365.31, 365.32, 365.37
71.09.096	365.00, 365.30
71.09.096(2)	365.00
71.09.096(5)(b)	365.00
77.57.030	380.04
80.36.400(3)	310.03
81.04.010(11)	100.02
81.112.080	150.05
86.09.211	150.07
86.09.214	150.07
87.03.145	150.07
90.48.142	380.04
Ch 90.58	380.00
90.64.030	380.04
4.32.120 through 4.32.150	303.02
4.56.050 through 4.56.075	303.02
47.52.040 through .050	151.01

WASHINGTON ADMINISTRATIVE CODE

Sec.	This work Instr. No.
162-16-240	330.04, 330.32
162-22-065	330.34
162-30-020	330.01
284-30-300 et seq.	320.00, 320.01
284-30-300 through 284-30-750	320.06
284-30-330, et seq.	320.06
284-30-330	320.00, 320.04, 320.06
284-30-330(4)	320.05
284-30-330(7)	320.06
296-14-350	155.08
296-19A-010(4)	155.07.01
296-20-200 et seq.	155.08
296-20-220	155.08
296-20-220(1)(d)	155.08.01
296-20-220(1)(g)	155.08
296-20-370(1)(d)	155.08
296-20-01002	155.13.01, 155.31
296-20-03002(4)	155.31
Ch 468-95	140.01
Ch 468-100	150.03

UNIFORM COMMERCIAL CODE

Sec.	This work Instr. No.
Title 62A	110.01.01

RESTATEMENT THIRD, AGENCY

Sec.	This work Instr. No.
1.01	50.00
1.02	50.00
2.04	50.00
7.07	50.00, 50.11.01
7.07(3)	50.11.01
7.08	50.00

RESTATEMENT THIRD, TORTS

Sec.	This work Instr. No.
2, Comment f	110.02
51	120.00

RESTATEMENT THIRD, TORTS (LIABILITY FOR PHYSICAL AND EMOTIONAL HARM)

Sec.	This work Instr. No.
26	340.06

RESTATEMENT THIRD, UNFAIR COMPETITION

Sec.	This work Instr. No.
39	351.02, 351.05
45, Comment f	351.01

RESTATEMENT SECOND, AGENCY

Sec.	This work Instr. No.
1	50.00
2	50.00
219	50.00
220	50.00
220(2)	50.11.01
250	50.00
267	105.02.03

RESTATEMENT SECOND, CONTRACTS

Sec.	This work Instr. No.
1	301.01
2	301A.01
2(1)	301.02, 301A.01
3, Comment a	301.01
4	301.02
19, Comment b	301.09
20, Comment b	301.03
71(1)	301.04
71(2)	301.04
90, Comment b	301A.01
90(1)	301A.01
151	301.08
152	301.08
152(1)	301.08
153, Comment b	301.09
154(b)	301.08
174	301.10
175	301.10
175(2)	301.10
176	301.10
176(1)	301.10
177	301.11
178, Comment f	301A.01
212, Comment b	301.05
234	302.01
234(1)	302.02
235(2)	302.01
241	302.03
245	302.08
265	302.10
266(2)	302.10
346	303.05
347	303.01, 303.03
348	303.03
349, Comment d	303.03, 303.05
350	303.06
351	303.01
351(2)(a)	303.03
353	303.01
356	303.07
370, Comment a	303.08
371	303.08
373(2)	303.08

RESTATEMENT SECOND, PROPERTY

Sec.	This work Instr. No.
17.6	130.06

RESTATEMENT SECOND, PROPERTY (LANDLORD AND TENANT)

Sec.	This work Instr. No.	Sec.	This work Instr. No.
17.6	130.06	17.6(2)	130.06

RESTATEMENT SECOND, TORTS

Sec.	This work Instr. No.	Sec.	This work Instr. No.
9	15.01		110.07, 110.30.02
Part c, § 29	340.06	402A(1)(b)	110.04
46	14.03, 14.03.01, 14.03.02, 14.03.03, 14.03.04	402B, Comment d	110.01.01
286	60.01.01, 60.03, 370.01, 370.07	409, Comment b	50.11
302B, Comment e	120.06.03	431	15.01, 15.02
311	165.00	495, Comment c	72.03
324A	110.03	500	14.01
328D	22.01	551	165.00, 165.03
330	120.08	551(1)	165.02
332	120.05	551(2)	165.00, 165.03
334	120.02	552	165.00, 165.01
341	120.03	552(1)	165.00, 165.01
341A	120.06, 120.07	766, Comment f	352.01
342 to 343A	120.00	767	352.03, 352.04, 352.05
342	120.02.01	768 to 773	352.01, 352.03
343, Comment b	120.00, 120.07, 130.00	768	352.04
343A	120.06, 120.07, 130.01, 130.02	769, Comment b	352.04, 352.06
357	130.01.01	771	352.06
358(1)	130.01	773	352.04, 352.06
363, Comment (b)	135.01	774	352.01, 352.02
368	135.01	918(1)	33.01
402A, Comment k	110.02.01, 110.03,	918(2)	33.01
		Ch 6	340.06

RESTATEMENT FIRST, CONTRACTS

Sec.	This work Instr. No.
2(1)	301.02
346	303.03
492	301.10

RESTATEMENT FIRST, RESTITUTION

Sec.	This work Instr. No.
1(b)	301A.02

RESTATEMENT FIRST, TORTS

Sec.	This work Instr. No.
357	130.01.01
757, Comment b	351.02, 351.07
766A	352.02
768 to 773	352.01, 352.03
768	352.05
773	352.04
774	352.02

Table of Cases

A

Acevedo-Garcia v. Monroig, 351 F.3d 547 (1st Cir. 2003)—340.06

Adair v. Weinberg, 79 Wash. App. 197, 901 P.2d 340 (Div. 1 1995)—105.01

Adams v. Department of Labor and Industries, 128 Wash. 2d 224, 905 P.2d 1220 (1995)—155.07

Adams v. Richland Clinic, Inc., P.S., 37 Wash. App. 650, 681 P.2d 1305 (Div. 3 1984)—105.04, 105.05

Adamski v. Tacoma General Hospital, 20 Wash. App. 98, 579 P.2d 970 (Div. 2 1978)—105.02.01, 105.02.03

Adamson v. Traylor, 60 Wash. 2d 332, 373 P.2d 961 (1962)—11.04, 15.05

Adcox v. Children's Orthopedic Hosp. and Medical Center, 123 Wash. 2d 15, 864 P.2d 921 (1993)—21.10, 41.04, 45.21, 105.02.01

Addington v. Texas, 441 U.S. 418, 99 S. Ct. 1804, 60 L. Ed. 2d 323 (1979)—360.06

Adickes v. S. H. Kress & Co., 398 U.S. 144, 90 S. Ct. 1598, 26 L. Ed. 2d 142 (1970)—340.03

Adjustment Dept., Olympia Credit Bureau v. Smedegard, 40 Wash. 2d 76, 241 P.2d 203 (1952)—160.02, 160.03, 165.06

Adkins v. Aluminum Co. of America, 110 Wash. 2d 128, 750 P.2d 1257 (1988)—1.08, 120.05, 120.06

Adkisson v. City of Seattle, 42 Wash. 2d 676, 258 P.2d 461 (1953)—14.01, 14.02

Albertson v. State, 191 Wash. App. 284, 361 P.3d 808 (Div. 2 2015)—15.05

Albin v. National Bank of Commerce of Seattle, 60 Wash. 2d 745, 375 P.2d 487 (1962)—135.01, 380.00, 380.06

Albrecht, In re, 147 Wash. 2d 1, 51 P.3d 73 (2002)—365.10, 365.15

Alderson v. Concordia Parish Correctional Facility, 848 F.3d 415 (5th Cir. 2017)—343.00, 343.05, 343.07

Alejandre v. Bull, 159 Wash. 2d 674, 153 P.3d 864 (2007)—165.00, 303.01

Alexander v. Gonser, 42 Wash. App. 234, 711 P.2d 347 (Div. 3 1985)—105.02.02, 105.04

Alger v. City of Mukilteo, 107 Wash. 2d 541, 730 P.2d 1333 (1987)—15.01

Allen v. American Land Research, 95 Wash. 2d 841, 631 P.2d 930 (1981)—310.00

Allen v. Department of Labor and Industries, 30 Wash. App. 693, 638 P.2d 104 (Div. 2 1981)—155.07, 155.07.01

Allen v. Department of Labor Industries, 16 Wash. App. 692, 559 P.2d 572 (Div. 2 1977)—155.07.01
Allen v. Muskogee, Okl., 119 F.3d 837 (10th Cir. 1997)—341.02, 341.04
Allison v. Bartelt, 121 Wash. 418, 209 P. 863 (1922)—4.01
Allison v. Department of Labor and Industries, 66 Wash. 2d 263, 401 P.2d 982 (1965)—155.03, 155.08
Allison v. Housing Authority of City of Seattle, 118 Wash. 2d 79, 821 P.2d 34 (1991)—15.02, 330.05
Allstate Ins. Co. v. Huston, 123 Wash. App. 530, 94 P.3d 358 (Div. 2 2004)—300.02
Almquist v. Finley School Dist. No. 53, 114 Wash. App. 395, 57 P.3d 1191, 171 Ed. Law Rep. 611 (Div. 3 2002)—110.04
Alonso v. Qwest Communications Co., LLC, 178 Wash. App. 734, 315 P.3d 610 (Div. 2 2013)—330.01.02, 330.05, 330.24
Alpental Community Club, Inc. v. Seattle Gymnastics Soc., 154 Wash. 2d 313, 111 P.3d 257, 8 A.L.R.6th 779 (2005)—380.00
Alpine Industries, Inc. v. Gohl, 30 Wash. App. 750, 637 P.2d 998 (Div. 1 1981)—301A.01, 303.03, 303.04
Alston v. Blythe, 88 Wash. App. 26, 943 P.2d 692 (Div. 2 1997)—12.06, 13.00, 13.02, 13.03
Alston v. Blythe, 86 Wn.App. 26, 943 P.2d 692 (1997)—70.03.03
Ambach v. French, 167 Wash. 2d 167, 216 P.3d 405 (2009)—105.04, 105.06, 310.06
Amend v. Bell, 89 Wash. 2d 124, 570 P.2d 138, 95 A.L.R.3d 225 (1977)—70.08
American Best Food, Inc. v. Alea London, Ltd., 168 Wash. 2d 398, 229 P.3d 693 (2010)—320.00, 320.02
American Manufacturers Mut. Ins. Co. v. Osborn, 104 Wash. App. 686, 17 P.3d 1229 (Div. 2 2001)—320.06
American Seamount Corp. v. Science and Engineering Associates, Inc., 61 Wash. App. 793, 812 P.2d 505 (Div. 1 1991)—50.18
American States Ins. Co. v. Symes of Silverdale, Inc., 150 Wash. 2d 462, 78 P.3d 1266 (2003)—320.02, 320.03, 320.04
Amrine v. Murray, 28 Wash. App. 650, 626 P.2d 24 (Div. 2 1981)—72.03
Anderson v. Akzo Nobel Coatings, Inc., 172 Wash. 2d 593, 260 P.3d 857 (2011)—21.01
Anderson v. Dalton, 40 Wash. 2d 894, 246 P.2d 853, 35 A.L.R.2d 302 (1952)—35.01
Anderson v. County of Kern, 45 F.3d 1310 (9th Cir. 1995)—343.00
Anderson v. Northern Pac. Ry. Co., 88 Wash. 139, 152 P. 1001 (1915)—100.03
Anderson v. City of Seattle, 123 Wash. 2d 847, 873 P.2d 489 (1994)—41.04
Anderson v. Weslo, Inc., 79 Wash. App. 829, 906 P.2d 336 (Div. 2 1995)—120.02.01
Anderson Hay & Grain Co., Inc. v. United Dominion Industries, Inc., 119 Wash. App. 249, 76 P.3d 1205 (Div. 3 2003)—110.04

Andrews v. Burke, 55 Wash. App. 622, 779 P.2d 740 (Div. 1 1989)—60.03, 105.02.02
Andrews v. Harley Davidson, Inc., 106 Nev. 533, 796 P.2d 1092 (1990)—110.02.03
Anfinson v. FedEx Ground Package System, Inc., 174 Wash. 2d 851, 281 P.3d 289 (2012)—330.00, 330.90
Anfinson v. FedEx Ground Package System, Inc., 159 Wash. App. 35, 244 P.3d 32 (Div. 1 2010)—50.11.01
Ang v. Martin, 154 Wash. 2d 477, 114 P.3d 637 (2005)—107.00, 107.08
Annechino v. Worthy, 175 Wash. 2d 630, 290 P.3d 126 (2012)—165.03
Antonius v. King County, 153 Wash. 2d 256, 103 P.3d 729 (2004)—330.00, 330.21, 330.81
Appleway Leasing, Inc. v. Tomlinson Dairy Farms, Inc., 22 Wash. App. 781, 591 P.2d 1220 (Div. 3 1979)—301.09
Archer v. Galbraith, 18 Wash. App. 369, 567 P.2d 1155 (Div. 1 1977)—105.04, 105.05
Arden v. Forsberg & Umlauf, P.S., 189 Wash. 2d 315, 402 P.3d 245 (2017)—107.08, 107.09
Argus v. Peter Kiewit Sons' Co., 49 Wash. 2d 853, 307 P.2d 261 (1957)—140.02
Arizona v. Gant, 556 U.S. 332, 129 S. Ct. 1710, 173 L. Ed. 2d 485, 47 A.L.R. Fed. 2d 657 (2009)—342.04, 342.05
Armstrong v. City of Seattle, 180 Wash. 39, 38 P.2d 377, 97 A.L.R. 826 (1934)—150.06
Arnold v. International Business Machines Corp., 637 F.2d 1350 (9th Cir. 1981)—340.06
Arthur v. Whitman County, 24 F. Supp. 3d 1024 (E.D. Wash. 2014)—330.23
Artz v. O'Bannon, 17 Wash. App. 421, 562 P.2d 674 (Div. 3 1977)—302.04
Ashcroft v. al-Kidd, 563 U.S. 731, 131 S. Ct. 2074, 179 L. Ed. 2d 1149 (2011)—340.01
Ashcroft v. Iqbal, 556 U.S. 662, 129 S. Ct. 1937, 173 L. Ed. 2d 868, 73 Fed. R. Serv. 3d 837 (2009)—340.00, 340.06
Aspon v. Loomis, 62 Wash. App. 818, 816 P.2d 751 (Div. 1 1991)—130.01, 130.06
Atherton Condominium Apartment-Owners Ass'n Bd. of Directors v. Blume Development Co., 115 Wash. 2d 506, 799 P.2d 250 (1990)—130.06, 380.00
Atkins v. Clein, 3 Wn.2d 168, 100 P.2d 1 (1940)—105.02
Atkinson v. Thrift Super Markets, Inc., 56 Wash. 2d 593, 354 P.2d 709 (1960)—302.02
Atwater v. City of Lago Vista, 532 U.S. 318, 121 S. Ct. 1536, 149 L. Ed. 2d 549 (2001)—342.08, 342.09
Auburn Mechanical, Inc. v. Lydig Const., Inc., 89 Wash. App. 893, 951 P.2d 311 (Div. 1 1998)—301A.02
Austin v. Ettl, 171 Wash. App. 82, 286 P.3d 85 (Div. 2 2012)—165.01, 165.03, 165.03.01

Ayers By and Through Ayers v. Johnson & Johnson Baby Products Co., a Subsidiary of Johnson & Johnson Co., 117 Wash. 2d 747, 818 P.2d 1337 (1991)—110.02, 110.03, 110.03.01

B

Babcock v. State By and Through Dept. of Social and Health Services, 112 Wash. 2d 83, 768 P.2d 481 (1989)—32.06.01

Backlund v. Puget Sound Traction, Light & Power Co., 86 Wash. 257, 150 P. 3 (1915)—100.07

Backlund v. University of Washington, 137 Wash. 2d 651, 975 P.2d 950 (1999)—105.04

Bader v. Marlin, 160 Wash. 460, 295 P. 160, 78 A.L.R. 914 (1931)—30.13

Badgett v. Security State Bank, 116 Wash. 2d 563, 807 P.2d 356, 14 U.C.C. Rep. Serv. 2d 385 (1991)—302.11

Bailie Communications, Ltd. v. Trend Business Systems, 53 Wash. App. 77, 765 P.2d 339 (Div. 1 1988)—302.03

Bailie Communications, Ltd. v. Trend Business Systems, Inc., 61 Wash. App. 151, 810 P.2d 12 (Div. 1 1991)—351.01

Baker v. Moeller, 52 Wash. 605, 101 P. 231 (1909)—130.05

Balmer v. Dilley, 81 Wash. 2d 367, 502 P.2d 456 (1972)—31.06.01, 32.06.01

Bank of Anacortes v. Cook, 10 Wash. App. 391, 517 P.2d 633 (Div. 1 1974)—107.04

Barker v. Skagit Speedway, Inc., 119 Wash. App. 807, 82 P.3d 244 (Div. 1 2003)—50.01

Barker v. Walter Hogan Enterprises, Inc., 23 Wash. App. 450, 596 P.2d 1359 (Div. 2 1979)—301.10

Barkhurst v. Department of Labor and Industries of State of Washington, 150 Wash. 551, 274 P. 105 (1929)—155.20

Barnes v. Washington Natural Gas Co., 22 Wash. App. 576, 591 P.2d 461 (Div. 1 1979)—330.31, 330.32

Barnett v. Sequim Valley Ranch, LLC, 174 Wash. App. 475, 302 P.3d 500 (Div. 2 2013)—330.52

Barnett v. U.S. Air, Inc., 228 F.3d 1105 (9th Cir. 2000)—330.34

Barrett v. Bank of America, 183 Cal. App. 3d 1362, 229 Cal. Rptr. 16 (4th Dist. 1986)—301.07

Barrett v. Lucky Seven Saloon, Inc., 152 Wash. 2d 259, 96 P.3d 386 (2004)—0.10, 60.03, 370.01, 370.01.01, 370.02, 370.05

Barrett v. Weyerhaeuser Co. Severance Pay Plan, 40 Wash. App. 630, 700 P.2d 338 (Div. 2 1985)—302.11

Barrie v. Hosts of America, Inc., 94 Wash. 2d 640, 618 P.2d 96 (1980)—370.02

Barstad v. Stewart Title Guar. Co., Inc., 145 Wash. 2d 528, 39 P.3d 984 (2002)—320.00, 320.02, 320.03

Bartlett v. Hantover, 84 Wash. 2d 426, 526 P.2d 1217 (1974)—34.02

Basin Paving, Inc. v. Port of Moses Lake, 48 Wash. App. 180, 737 P.2d 1312 (Div. 3 1987)—301.09

Bass v. City of Tacoma, 90 Wash. App. 681, 953 P.2d 129 (Div. 2 1998)—330.32
Bates v. United Parcel Service, Inc., 511 F.3d 974 (9th Cir. 2007)—330.37
Bateson v. Geisse, 857 F.2d 1300 (9th Cir. 1988)—341.02
Batten v. South Seattle Water Co., 65 Wash. 2d 547, 398 P.2d 719 (1965)—140.02
Bauer v. White, 95 Wash. App. 663, 976 P.2d 664 (Div. 3 1999)—105.01
Baughn v. Honda Motor Co., Ltd., 107 Wash. 2d 127, 727 P.2d 655, 2 U.C.C. Rep. Serv. 2d 445 (1986)—15.01, 110.01, 110.01.01, 110.03
Baughn v. Malone, 33 Wash. App. 592, 656 P.2d 1118 (Div. 1 1983)—10.01, 11.01
Bauman by Chapman v. Crawford, 104 Wash. 2d 241, 704 P.2d 1181 (1985)—10.05, 31.06.01, 32.06.01, 60.04
Bauman by Chapman v. Crawford, 38 Wash. App. 301, 685 P.2d 1104 (Div. 1 1984)—24.01
Baumgardner v. American Motors Corp., 83 Wash. 2d 751, 522 P.2d 829 (1974)—110.02, 110.02.02, 110.02.03
Baxter v. Ford Motor Co., 168 Wash. 456, 12 P.2d 409, 88 A.L.R. 521 (1932)—110.01.01
Baxter v. Morningside, Inc., 10 Wash. App. 893, 521 P.2d 946, 82 A.L.R.3d 1206 (Div. 2 1974)—50.01
Baynes v. Cleland, 799 F.3d 600 (6th Cir. 2015)—343.00
Baynes ex rel. Baynes v. Rustler's Gulch Syndicate, LLC, 142 Wash. App. 335, 173 P.3d 1000 (Div. 3 2007)—370.12
Bays v. St. Lukes Hosp., 63 Wash. App. 876, 825 P.2d 319 (Div. 3 1992)—105.04
Bd. of County Comm'rs v. Umbehr, 518 U.S. 668, 116 S.Ct. 2342, 135 L.Ed.2d 843 (1996)—340.06
Bearint ex rel. Bearint v. Dorell Juvenile Group, Inc., 389 F.3d 1339, 65 Fed. R. Evid. Serv. 996 (11th Cir. 2004)—110.02.03
Beaver v. Harris' Estate, 67 Wash. 2d 621, 409 P.2d 143 (1965)—301.08
Becerra v. Expert Janitorial, LLC, 181 Wash. 2d 186, 332 P.3d 415 (2014)—330.91
Becerra v. Expert Janitorial, LLC, 176 Wash. App. 694, 309 P.3d 711 (Div. 1 2013)—330.91
Beck v. State of Ohio, 379 U.S. 89, 85 S. Ct. 223, 13 L. Ed. 2d 142 (1964)—342.08, 342.09
Beck v. City of Upland, 527 F.3d 853 (9th Cir. 2008)—340.01, 340.06
Becker v. Community Health Systems, Inc., 184 Wash. 2d 252, 359 P.3d 746 (2015)—330.00, 330.50, 330.51
Beebe v. Moses, 113 Wash. App. 464, 54 P.3d 188 (Div. 3 2002)—120.00, 120.05, 120.08, 120.08.01
Beeson Bros. v. Chambers, 155 Wash. 564, 285 P. 433 (1930)—303.03, 303.06
Behnke v. Ahrens, 172 Wash. App. 281, 294 P.3d 729 (Div. 1 2012)—310.08

Beireis v. Leslie, 35 Wash. 2d 554, 214 P.2d 194 (1950)—70.03.03
Bell v. State, 147 Wash. 2d 166, 52 P.3d 503 (2002)—0.10
Bell v. Wheeler, 14 Wash. App. 4, 538 P.2d 857 (Div. 2 1975)—12.02
Bell v. Wolfish, 441 U.S. 520, 99 S. Ct. 1861, 60 L. Ed. 2d 447 (1979)—342.03, 343.00
Bellevue, City of v. Kravik, 69 Wash. App. 735, 850 P.2d 559 (Div. 1 1993)—151.15
Belnap v. Boeing Co., 64 Wash. App. 212, 823 P.2d 528 (Div. 1 1992)—155.03
Belo Management Services, Inc. v. ClickA Network, 184 Wash. App. 649, 343 P.3d 370 (Div. 2 2014)—351.02
Benjamin v. City of Seattle, 74 Wash. 2d 832, 447 P.2d 172 (1968)—100.15
Bennett v. Hardy, 113 Wash. 2d 912, 784 P.2d 1258 (1990)—330.00
Bennett v. McCready, 57 Wash. 2d 317, 356 P.2d 712 (1960)—12.02
Bennett v. Messick, 76 Wash. 2d 474, 457 P.2d 609 (1969)—30.18
Bennett v. Shinoda Floral, Inc., 108 Wash. 2d 386, 739 P.2d 648 (1987)—301.08
Benoy v. Simons, 66 Wash. App. 56, 831 P.2d 167 (Div. 3 1992)—31.01, 105.04
Benson v. Tacoma Ry. & Power Co., 51 Wash. 216, 98 P. 605 (1908)—100.08
Berg v. Hudesman, 115 Wash. 2d 657, 801 P.2d 222 (1990)—301.05, 301.06
Berg v. Kincheloe, 794 F.2d 457 (9th Cir. 1986)—343.06
Berger v. Personal Products, Inc., 115 Wash. 2d 267, 797 P.2d 1148 (1990)—110.00
Berglund v. Spokane County, 4 Wash. 2d 309, 103 P.2d 355 (1940)—140.01
Bernsen v. Big Bend Elec. Co-op., Inc., 68 Wash. App. 427, 842 P.2d 1047 (Div. 3 1993)—33.03, 330.83
Berry v. Coleman Systems Co., 23 Wash. App. 622, 596 P.2d 1365 (Div. 3 1979)—110.03
Berschauer/Phillips Const. Co. v. Seattle School Dist. No. 1, 124 Wash. 2d 816, 881 P.2d 986, 94 Ed. Law Rep. 610 (1994)—302.05, 302.06, 303.01
Bertsch v. Brewer, 97 Wash. 2d 83, 640 P.2d 711 (1982)—105.04
Besel v. Viking Ins. Co. of Wisconsin, 146 Wash. 2d 730, 49 P.3d 887 (2002)—320.01, 320.01.01, 320.03, 320.05
Betchard-Clayton, Inc. v. King, 41 Wash. App. 887, 707 P.2d 1361 (Div. 1 1985)—302.11
Beyer v. Dep't of Labor & Indus., 17 Wn.2d 29, 134 P.2d 948 (1943)—155.21
Bich v. General Elec. Co., 27 Wash. App. 25, 614 P.2d 1323, 10 A.L.R.4th 842 (Div. 3 1980)—110.04
Bichl v. Poinier, 71 Wash. 2d 492, 429 P.2d 228 (1967)—70.04
Bickelhaupt v. Inland Motor Freight, 191 Wash. 467, 71 P.2d 403 (1937)—45.01.01

Bill v. Gattavara, 34 Wash. 2d 645, 209 P.2d 457 (1949)—303.08
Billington v. Schaal, 42 Wash. 2d 878, 259 P.2d 634 (1953)—70.04
Bingaman v. Grays Harbor Community Hosp., 103 Wash. 2d 831, 699 P.2d 1230 (1985)—31.01.01
Birch v. Abercrombie, 74 Wash. 486, 133 P. 1020 (1913)—72.05
Birchfield v. North Dakota, 136 S. Ct. 2160, 195 L. Ed. 2d 560 (2016)—342.05
Birklid v. Boeing Co., 127 Wash. 2d 853, 904 P.2d 278 (1995)—14.03, 14.03.02
Bishop v. Miche, 137 Wash. 2d 518, 973 P.2d 465 (1999)—15.05
Bissell v. Seattle Vancouver Motor Freight, 25 Wash. 2d 68, 168 P.2d 390 (1946)—60.01.01
Bitzan v. Parisi, 88 Wash. 2d 116, 558 P.2d 775 (1977)—30.06
Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics, 403 U.S. 388, 91 S. Ct. 1999, 29 L. Ed. 2d 619 (1971)—340.06
Blackburn v. State, 186 Wash. 2d 250, 375 P.3d 1076 (2016)—330.00, 330.01.02, 330.23
Blake v. Federal Way Cycle Center, 40 Wash. App. 302, 698 P.2d 578 (Div. 2 1985)—310.08
Blanchette v. Spokane County Fire Protection Dist. No. 1, 67 Wash. App. 499, 836 P.2d 858 (Div. 3 1992)—330.32
Bland v. Mentor, 63 Wash. 2d 150, 385 P.2d 727 (1963)—160.02
Blaney v. International Association of Machinists And Aerospace Workers, Dist. No. 160, 151 Wash. 2d 203, 87 P.3d 757 (2004)—330.81, 330.82
Blankenship v. State, 160 Wash. 514, 295 P. 480 (1931)—150.05
Blasick v. City of Yakima, 45 Wash. 2d 309, 274 P.2d 122 (1954)—15.01, 15.02
Blide v. Rainier Mountaineering, Inc., 30 Wash. App. 571, 636 P.2d 492 (Div. 1 1981)—13.04
Blodgett v. Olympic Sav. and Loan Ass'n, 32 Wash. App. 116, 646 P.2d 139 (Div. 2 1982)—15.01
Bloor v. Fritz, 143 Wash. App. 718, 180 P.3d 805 (Div. 2 2008)—310.08
BMW of North America, Inc. v. Gore, 517 U.S. 559, 116 S. Ct. 1589, 134 L. Ed. 2d 809 (1996)—348.02
Board of County Com'rs of Bryan County, Okl. v. Brown, 520 U.S. 397, 117 S. Ct. 1382, 137 L. Ed. 2d 626 (1997)—340.02, 340.06, 341.01, 341.02, 341.04
Boeing Co. v. Harker-Lott, 93 Wash. App. 181, 968 P.2d 14 (Div. 1 1998)—155.13.01
Boeing Co. v. Sierracin Corp., 108 Wash. 2d 38, 738 P.2d 665 (1987)—310.01, 351.01, 351.02, 351.03, 351.05, 351.07
Boeing Co. v. State, 89 Wash. 2d 443, 572 P.2d 8 (1978)—140.01
Bohn v. Cody, 119 Wash. 2d 357, 832 P.2d 71 (1992)—107.01
Bonko v. Department of Labor and Industries, 2 Wash. App. 22, 466 P.2d 526 (Div. 3 1970)—155.07
Bordanaro v. McLeod, 871 F.2d 1151, 27 Fed. R. Evid. Serv. 1164 (1st Cir. 1989)—341.02

Bordon ex rel. Anderson, Estate of v. State, Dept. of Corrections, 122 Wash. App. 227, 95 P.3d 764 (Div. 1 2004)—15.01
Bordynoski v. Bergner, 97 Wn.2d 335,338, 644 P.2d 1173 (1982)—11.01
Boring v. Kozakiewicz, 833 F.2d 468 (3d Cir. 1987)—343.04
Bostwick v. Ballard Marine, Inc., 127 Wash. App. 762, 112 P.3d 571 (Div. 1 2005)—110.04
Bowers v. Fibreboard Corp., 66 Wash. App. 454, 832 P.2d 523 (Div. 2 1992)—20.05
Bowers v. Transamerica Title Ins. Co., 100 Wash. 2d 581, 675 P.2d 193 (1983)—107.04
Bowman v. Two, 104 Wash. 2d 181, 704 P.2d 140 (1985)—107.00
Bowman v. Whitelock, 43 Wash. App. 353, 717 P.2d 303 (Div. 1 1986)—30.17
Boyce v. West, 71 Wash. App. 657, 862 P.2d 592, 87 Ed. Law Rep. 273 (Div. 3 1993)—10.07, 13.04
Boyd v. State, Dept. of Social and Health Services, 187 Wash. App. 1, 349 P.3d 864 (Div. 2 2015)—330.01, 330.01.02, 330.05, 330.06
Boyle v. Emerson, 17 Wash. App. 101, 561 P.2d 1110 (Div. 1 1977)—71.02
Braaten v. Saberhagen Holdings, 165 Wash. 2d 373, 198 P.3d 493 (2008)—110.04
Bracy v. Lund, 197 Wash. 188, 84 P.2d 670 (1938)—15.05
Bracy v. United Retail Merchants, 189 Wash. 162, 63 P.2d 491 (1937)—303.03, 303.04
Bradley v. American Smelting and Refining Co., 104 Wash. 2d 677, 709 P.2d 782 (1985)—380.03
Bradley v. S.L. Savidge, Inc., 13 Wash. 2d 28, 123 P.2d 780 (1942)—50.08
Bradshaw v. City of Seattle, 43 Wash. 2d 766, 264 P.2d 265, 42 A.L.R.2d 800 (1953)—34.04
Brady v. Daily World, 105 Wash. 2d 770, 718 P.2d 785 (1986)—330.32
Brannan v. Department of Labor & Industries, 104 Wash. 2d 55, 700 P.2d 1139 (1985)—155.08
Branom v. State, 94 Wash. App. 964, 974 P.2d 335 (Div. 1 1999)—105.04, 105.06
Brashear v. Puget Sound Power & Light Co., 100 Wn.2d 208, 667 P.2d 78 (1983)—15.04
Brashear v. Puget Sound Power & Light Co., Inc., 100 Wash. 2d 204, 667 P.2d 78 (1983)—15.01, 15.04, 310.07
Bratton v. Calkins, 73 Wash. App. 492, 870 P.2d 981, 90 Ed. Law Rep. 449 (Div. 3 1994)—50.02
Bravo v. City of Santa Maria, 665 F.3d 1076, 101 A.L.R.6th 615 (9th Cir. 2011)—340.06
Bray v. Alexandria Women's Health Clinic, 506 U.S. 263, 113 S. Ct. 753, 122 L. Ed. 2d 34, 169 A.L.R. Fed. 649 (1993)—340.00
Breimon v. General Motors Corp., 8 Wash. App. 747, 509 P.2d 398 (Div. 1 1973)—6.05

Breivo v. City of Aberdeen, 15 Wash. App. 520, 550 P.2d 1164 (Div. 2 1976)—140.01.01
Bremerton, City of v. Shreeve, 55 Wash. App. 334, 777 P.2d 568 (Div. 2 1989)—155.06
Brentwood Academy v. Tennessee Secondary School Athletic Ass'n, 531 U.S. 288, 121 S. Ct. 924, 148 L. Ed. 2d 807, 151 Ed. Law Rep. 18 (2001)—340.00, 340.03
Brewer v. Berner, 15 Wash. 2d 644, 131 P.2d 940 (1942)—12.03
Brewer v. Dodson Aviation, 447 F. Supp. 2d 1166 (W.D. Wash. 2006)—110.08
Brewer v. City of Napa, 210 F.3d 1093, 53 Fed. R. Evid. Serv. 1093 (9th Cir. 2000)—342.01, 342.03
Brigham City, Utah v. Stuart, 547 U.S. 398, 126 S. Ct. 1943, 164 L. Ed. 2d 650 (2006)—342.07
Brink v. Martin, 50 Wash. 2d 256, 310 P.2d 870 (1957)—50.04, 50.05
Brothers v. Public School Employees of Washington, 88 Wash. App. 398, 945 P.2d 208 (Div. 1 1997)—302.04
Brower v. Ackerley, 88 Wash. App. 87, 943 P.2d 1141 (Div. 1 1997)—14.03.04, 120.07
Brower v. County of Inyo, 489 U.S. 593, 109 S. Ct. 1378, 103 L. Ed. 2d 628 (1989)—342.02
Brown v. Brown, 100 Wash. 2d 729, 675 P.2d 1207 (1984)—30.01.01, 31.07, 31.07.01, 41.01, 110.30.01, 110.30.02, 110.31.01
Brown v. Bryan County, OK, 219 F.3d 450 (5th Cir. 2000)—341.02, 341.04
Brown v. Crescent Stores, Inc., 54 Wash. App. 861, 776 P.2d 705 (Div. 3 1989)—100.02
Brown v. Dahl, 41 Wash. App. 565, 705 P.2d 781 (Div. 2 1985)—22.01, 105.01
Brown v. Hauge, 105 Wash. App. 800, 21 P.3d 716 (Div. 3 2001)—130.01.01
Brown v. Prime Const. Co., Inc., 102 Wash. 2d 235, 684 P.2d 73 (1984)—15.01
Brown v. Safeway Stores, Inc., 94 Wash. 2d 359, 617 P.2d 704 (1980)—301A.01, 352.04
Brown v. Scott Paper Worldwide Co., 143 Wash. 2d 349, 20 P.3d 921 (2001)—330.00, 330.01
Brown v. City of Seattle, 5 Wash. 35, 31 P. 313 (1892)—150.00
Brown v. Spokane County Fire Protection Dist. No. 1, 100 Wash. 2d 188, 668 P.2d 571 (1983)—12.02, 70.06, 71.01, 71.05
Browne v. Avvo Inc., 525 F. Supp. 2d 1249 (W.D. Wash. 2007)—310.07
Brownfield v. City of Yakima, 178 Wash. App. 850, 316 P.3d 520 (Div. 3 2014)—330.00, 330.32
Brown for Hejna v. Yamaha Motor Corp., U.S.A., 38 Wash. App. 914, 691 P.2d 577 (Div. 2 1984)—12.02
Browning v. Johnson, 70 Wn.2d 145, 422 P.2d 314 (1967)—301.04
Browning v. Slenderella Systems of Seattle, 54 Wash. 2d 440, 341 P.2d 859 (1959)—14.03.02, 330.01

Bruce Templeton ex rel. Templeton, Estate of v. Daffern, 98 Wash. App. 677, 990 P.2d 968 (Div. 2 2000)—370.12
Brundridge v. Fluor Federal Services Inc., 109 Wash. App. 347, 35 P.3d 389 (Div. 3 2001)—302.07
Brunton v. Ellensburg Washington Lodge No. 1102 of Benev. and Protective Order of Elks, 73 Wash. App. 891, 872 P.2d 47 (Div. 3 1994)—130.05
Brust v. Newton, 70 Wash. App. 286, 852 P.2d 1092 (Div. 1 1993)—107.07
Bryan v. Jones, 530 F.2d 1210 (5th Cir. 1976)—340.02
Bryant v. Wyeth, 879 F. Supp. 2d 1214 (W.D. Wash. 2012)—110.00
Buchalski v. Universal Marine Corp., 393 F. Supp. 246 (W.D. Wash. 1975)—30.18.01
Buchanan v. Kettner, 97 Wash. App. 370, 984 P.2d 1047 (Div. 2 1999)—303.07
Buchanan v. Simplot Feeders, Ltd. Partnership, 134 Wash. 2d 673, 952 P.2d 610 (1998)—380.00, 380.06
Buffets, Inc. v. Klinke, 73 F.3d 965 (9th Cir. 1996)—351.02, 351.05
Bulaich v. AT & T Information Systems, 113 Wash. 2d 254, 778 P.2d 1031 (1989)—330.52
Bullock v. Yakima Valley Transp. Co., 108 Wash. 413, 184 P. 641 (1919)—20.01
Bulman v. Safeway, Inc., 144 Wash. 2d 335, 27 P.3d 1172 (2001)—301A.01
Bunch v. King County Dept. of Youth Services, 155 Wash. 2d 165, 116 P.3d 381 (2005)—330.81
Burchfiel v. Boeing Corp., 149 Wash. App. 468, 205 P.3d 145 (Div. 3 2009)—330.32
Burget v. Saginaw Logging Co., 197 Wash. 318, 85 P.2d 271 (1938)—12.01
Burien Motors, Inc. v. Balch, 9 Wash. App. 573, 513 P.2d 582 (Div. 1 1973)—107.04
Burke v. City of Seattle, 85 Wash. 445, 148 P. 574 (1915)—30.06
Burkhart v. Harrod, 110 Wash. 2d 381, 755 P.2d 759 (1988)—370.01, 370.06, 370.09, 370.12
Burlington Industries, Inc. v. Ellerth, 524 U.S. 742, 118 S. Ct. 2257, 141 L. Ed. 2d 633, 170 A.L.R. Fed. 677 (1998)—330.21
Burlington Northern and Santa Fe Ry. Co. v. White, 548 U.S. 53, 126 S. Ct. 2405, 165 L. Ed. 2d 345 (2006)—330.05, 330.06
Burnet v. Spokane Ambulance, 54 Wash. App. 162, 772 P.2d 1027 (Div. 3 1989)—105.02.01, 105.04
Burnham v. Commercial Cas. Ins. Co. of Newark, N. J., 10 Wash. 2d 624, 117 P.2d 644 (1941)—320.00, 320.05
Burnham v. Nehren, 7 Wash. App. 860, 503 P.2d 122 (Div. 1 1972)—70.03, 70.03.03
Burns v. Dills, 68 Wash. 2d 377, 413 P.2d 370 (1966)—30.06
Burnside v. Simpson Paper Co., 66 Wash. App. 510, 832 P.2d 537 (Div. 1 1992)—330.01, 330.83

Burrier v. Mutual Life Ins. Co. of New York, 63 Wash. 2d 266, 387 P.2d 58 (1963)—24.03, 24.05
Burt v. Ross, 43 Wash. App. 129, 715 P.2d 538 (Div. 2 1986)—32.06.01
Burton v. Clark County, 91 Wash. App. 505, 958 P.2d 343 (Div. 2 1998)—150.04
Buttelo v. S.A. Woods-Yates American Mach. Co., Inc., 72 Wash. App. 397, 864 P.2d 948 (Div. 2 1993)—110.04
Byerly v. Madsen, 41 Wash. App. 495, 704 P.2d 1236 (Div. 3 1985)—105.01, 105.02.01, 105.02.02
Bylsma v. Burger King Corp., 176 Wash. 2d 555, 293 P.3d 1168 (2013)—110.00, 110.30.01

C

Cagle v. Burns and Roe, Inc., 106 Wash. 2d 911, 726 P.2d 434 (1986)—30.06, 330.81
Calbom v. Knudtzon, 65 Wash. 2d 157, 396 P.2d 148 (1964)—352.01, 352.06
Caldellis, In re, 187 Wash. 2d 127, 385 P.3d 135 (2016)—0.10
California v. Hodari D., 499 U.S. 621, 111 S. Ct. 1547, 113 L. Ed. 2d 690 (1991)—342.03
Callan v. O'Neil, 20 Wash. App. 32, 578 P.2d 890 (Div. 1 1978)—370.07
Callen v. Coca-Cola Bottling Inc., 50 Wash. 2d 180, 310 P.2d 236 (1957)—50.08
Cameron v. Boone, 62 Wash. 2d 420, 383 P.2d 277 (1963)—12.01
Cameron v. Downs, 32 Wash. App. 875, 650 P.2d 260 (Div. 1 1982)—72.05
Cameron v. Murray, 151 Wash. App. 646, 214 P.3d 150, 247 Ed. Law Rep. 973 (Div. 1 2009)—370.05
Camicia v. Howard S. Wright Const. Co., 179 Wash. 2d 684, 317 P.3d 987 (2014)—120.07
Campbell v. Hauser Lumber Co., 147 Wash. 140, 265 P. 468 (1928)—302.03
Campbell v. Seattle Engine Rebuilders & Remanufacturing, Inc., 75 Wash. App. 89, 876 P.2d 948 (Div. 1 1994)—310.03
C & K Engineering Contractors v. Amber Steel Co., 23 Cal. 3d 1, 151 Cal. Rptr. 323, 587 P.2d 1136 (1978)—301A.01
Canton, Ohio, City of v. Harris, 489 U.S. 378, 109 S. Ct. 1197, 103 L. Ed. 2d 412 (1989)—341.02, 341.04
CarePartners, LLC v. Lashway, 545 F.3d 867 (9th Cir. 2008)—340.01
Carey v. Piphus, 435 U.S. 247, 98 S. Ct. 1042, 55 L. Ed. 2d 252 (1978)—340.06, 348.01
Carey v. Reeve, 56 Wash. App. 18, 781 P.2d 904 (Div. 1 1989)—24.01
Carlile v. Harbour Homes, Inc., 147 Wash. App. 193, 194 P.3d 280 (Div. 1 2008)—310.07
Carlson v. Leonardo Truck Lines, Inc., 13 Wash. App. 795, 538 P.2d 130 (Div. 3 1975)—302.02
Carmody v. Trianon Co., 7 Wash. 2d 226, 109 P.2d 560 (1941)—30.06

Carr v. Martin, 35 Wash. 2d 753, 215 P.2d 411 (1950)—30.07.01
Cascade Auto Glass, Inc. v. Progressive Cas. Ins. Co., 135 Wash. App. 760, 145 P.3d 1253 (Div. 2 2006)—301.01
Cash v. County of Erie, 654 F.3d 324 (2d Cir. 2011)—340.06
Castle Rock, Colo., Town of v. Gonzales, 545 U.S. 748, 125 S. Ct. 2796, 162 L. Ed. 2d 658 (2005)—340.00
Castro v. County of Los Angeles, 833 F.3d 1060 (9th Cir. 2016)—341.02, 341.04, 343.00, 343.05, 343.07
Cavanaugh v. Brewington, 3 Wash. App. 757, 477 P.2d 644 (Div. 3 1970)—301.09
Cavazos v. Franklin, 73 Wash. App. 116, 867 P.2d 674 (Div. 3 1994)—31.03.02, 31.06.01
Cayce v. Department of Labor and Industries, 2 Wash. App. 315, 467 P.2d 879 (Div. 1 1970)—155.08
Central Heat, Inc. v. Daily Olympian, Inc., 74 Wash. 2d 126, 443 P.2d 544, 44 A.L.R.3d 750 (1968)—301A.01
Central Puget Sound Regional Transit Authority v. Heirs and Devisees of Eastey, 135 Wash. App. 446, 144 P.3d 322 (Div. 1 2006)—150.06, 151.02
Chaloupka v. Cyr, 63 Wash. 2d 463, 387 P.2d 740 (1963)—24.03
Chambers-Castanes v. King County, 100 Wash. 2d 275, 669 P.2d 451, 39 A.L.R.4th 671 (1983)—14.03
Chandler v. Washington Toll Bridge Authority, 17 Wash. 2d 591, 137 P.2d 97 (1943)—301A.02, 303.08
Channel v. Mills, 77 Wash. App. 268, 890 P.2d 535 (Div. 2 1995)—70.05
Chapman v. Black, 49 Wash. App. 94, 741 P.2d 998 (Div. 1 1987)—50.01, 50.11.01
Chapple v. Ganger, 851 F. Supp. 1481 (E.D. Wash. 1994)—31.01.01
Charles, State ex rel. v. Bellingham Municipal Court, 26 Wash. App. 144, 612 P.2d 427 (Div. 1 1980)—6.14
Charlton v. Day Island Marina, Inc., 46 Wash. App. 784, 732 P.2d 1008 (Div. 2 1987)—130.01, 130.05
Chase v. City of Tacoma, 23 Wash. App. 12, 594 P.2d 942 (Div. 1 1979)—150.06.01, 151.11
Chaussee, In re, 399 B.R. 225 (B.A.P. 9th Cir. 2008)—310.00
Chavers v. Ohad, 59 Wash. 2d 646, 369 P.2d 831 (1962)—70.02
Chemical Bank v. Washington Public Power Supply System, 102 Wash. 2d 874, 691 P.2d 524, 40 U.C.C. Rep. Serv. 1026 (1984)—302.06
Cherberg v. Peoples Nat. Bank of Washington, 88 Wash. 2d 595, 564 P.2d 1137 (1977)—130.02, 352.01, 352.03
Chess v. Dovey, 790 F.3d 961 (9th Cir. 2015)—343.00
Chester v. Deep Roots Alderwood, LLC, 193 Wash. App. 147, 371 P.3d 113 (Div. 1 2016)—60.01.01
Chesterfield v. Nash, 96 Wash. App. 103, 978 P.2d 551 (Div. 1 1999)—24.03
CHG Intern., Inc. v. Robin Lee, Inc., 35 Wash. App. 512, 667 P.2d 1127 (Div. 1 1983)—302.02, 302.11

Chhuth v. George, 43 Wash. App. 640, 719 P.2d 562, 32 Ed. Law Rep. 1107 (Div. 3 1986)—70.05
Chicago, M. & St. P. Ry. Co. v. Alexander, 47 Wash. 131, 91 P. 626 (1907)—150.11, 151.09
Chimel v. California, 395 U.S. 752, 89 S. Ct. 2034, 23 L. Ed. 2d 685 (1969)—342.05
Christen v. Lee, 113 Wash. 2d 479, 780 P.2d 1307 (1989)—15.01, 15.05, 370.01, 370.02, 370.05, 370.06, 370.07, 370.12
Christensen v. Munsen, 123 Wash. 2d 234, 867 P.2d 626, 30 A.L.R.5th 822 (1994)—105.07, 105.08
Christian v. Tohmeh, 191 Wash. App. 709, 366 P.3d 16 (Div. 3 2015)—105.09
Christie v. Maxwell, 40 Wash. App. 40, 696 P.2d 1256 (Div. 3 1985)—32.04
Chunyk & Conley/Quad-C v. Bray, 156 Wash. App. 246, 232 P.3d 564 (Div. 2 2010)—155.02.01
Ciminski v. Finn Corp., Inc., 13 Wash. App. 815, 537 P.2d 850, 85 A.L.R.3d 991 (Div. 2 1975)—120.06.02
Citizens for Des Moines, Inc. v. Petersen, 125 Wash. App. 760, 106 P.3d 290 (Div. 1 2005)—301.04
Citoli v. City of Seattle, 115 Wash. App. 459, 61 P.3d 1165 (Div. 1 2002)—340.04
City of Anacortes, Petition of, 81 Wash. 2d 166, 500 P.2d 546 (1972)—150.05
City of Seattle, to Acquire Certain Property in Moore's Five Acre Tracts, Petition of, 49 Wash. 2d 247, 299 P.2d 843 (1956)—150.12
CKP, Inc. v. GRS Const. Co., 63 Wash. App. 601, 821 P.2d 63 (Div. 1 1991)—50.01
Clairmont v. Sound Mental Health, 632 F.3d 1091 (9th Cir. 2011)—340.06
Clark v. Icicle Irr. Dist., 72 Wash. 2d 201, 432 P.2d 541 (1967)—31.06.01, 32.06.01
Clark v. Payne, 61 Wash. App. 189, 810 P.2d 931 (Div. 2 1991)—70.08
Clark County v. McManus, 185 Wash. 2d 466, 372 P.3d 764 (2016)—155.13.01
Clark County Fire Dist. No. 5 v. Bullivant Houser Bailey P.C., 180 Wash. App. 689, 324 P.3d 743 (Div. 2 2014)—107.04
Clarke v. Shoreline School Dist. No. 412, King County, 106 Wash. 2d 102, 720 P.2d 793, 33 Ed. Law Rep. 556 (1986)—330.34
Clason v. Velguth, 168 Wash. 242, 11 P.2d 249 (1932)—31.02.01
Clem v. Lomeli, 566 F.3d 1177 (9th Cir. 2009)—340.04
Clements v. Blue Cross of Washington & Alaska, Inc., 37 Wash. App. 544, 682 P.2d 942 (Div. 1 1984)—11.01, 70.03
Clipse v. Commercial Driver Services, Inc., 189 Wash. App. 776, 358 P.3d 464 (Div. 2 2015)—301A.01, 330.31, 330.31.01
Clouthier v. County of Contra Costa, 591 F.3d 1232 (9th Cir. 2010)—343.00

Cobb v. Snohomish County, 86 Wash. App. 223, 935 P.2d 1384 (Div. 1 1997)—33.01, 330.83
Codd v. Stevens Pass, Inc., 45 Wash. App. 393, 725 P.2d 1008 (Div. 1 1986)—13.03, 120.05, 120.06
Coffman v. McFadden, 68 Wash. 2d 954, 416 P.2d 99 (1966)—72.05
Colbert v. Moomba Sports, Inc., 163 Wash. 2d 43, 176 P.3d 497 (2008)—15.01
Cole v. McGhie, 59 Wn.2d 436, 367 P.2d 844 (1962)—2.14
Cole v. McGhie, 59 Wn.2d 436, 361 P.2d 938 (1961)—6.03, 6.05
Cole v. McGhie, 59 Wn.2d 436—2.14, 6.05
Cole v. Schaub, 164 Wash. 162, 2 P.2d 669 (1931)—30.06
Colella v. King County, 72 Wash. 2d 386, 433 P.2d 154 (1967)—150.06.02
Coleman v. Altman, 7 Wash. App. 80, 497 P.2d 1338 (Div. 1 1972)—70.03.05
Coleman v. Ernst Home Center, Inc., 70 Wash. App. 213, 853 P.2d 473 (Div. 1 1993)—120.06.02
Colonial Imports, Inc. v. Carlton Northwest, Inc., 121 Wash. 2d 726, 853 P.2d 913 (1993)—165.02, 165.03, 165.04
Colorado Structures, Inc. v. Insurance Co. of the West, 161 Wash. 2d 577, 167 P.3d 1125 (2007)—302.02, 302.03
Columbia Physical Therapy, Inc., P.S. v. Benton Franklin Orthopedic Associates, P.L.L.C., 168 Wash. 2d 421, 228 P.3d 1260 (2010)—310.08
Combes v. Snow, 56 Wash. 2d 122, 351 P.2d 419 (1960)—72.04
Commercial Inv. Co. v. National Bank of Commerce, 36 Wash. 287, 78 P. 910 (1904)—303.01
Commodore v. University Mechanical Contractors, Inc., 120 Wash. 2d 120, 839 P.2d 314 (1992)—352.01
Connick v. Thompson, 563 U.S. 51, 131 S. Ct. 1350, 179 L. Ed. 2d 417 (2011)—341.02, 341.04
Conradt v. Four Star Promotions, Inc., 45 Wash. App. 847, 728 P.2d 617 (Div. 3 1986)—32.04
Consolidated Diking Imp. Dist. No. 3 v. Davis, 36 Wash. App. 125, 672 P.2d 414 (Div. 2 1983)—150.05
Contreras v. Crown Zellerbach Corp., 88 Wash. 2d 735, 565 P.2d 1173 (1977)—14.03, 14.03.02
Cook v. Gisler, 20 Wash. App. 677, 582 P.2d 550 (Div. 2 1978)—16.01
Cook v. Seidenverg, 36 Wash. 2d 256, 217 P.2d 799 (1950)—15.01, 15.05
Cook v. Tarbert Logging, Inc., 190 Wash. App. 448, 360 P.3d 855 (Div. 3 2015)—5.01
Cook, Flanagan and Berst v. Clausing, 73 Wash. 2d 393, 438 P.2d 865 (1968)—107.04
Coombs v. R. D. Bodle Co., 33 Wash. 2d 280, 205 P.2d 888 (1949)—50.01
Cooper v. Aaron, 358 U.S. 1, 78 S.Ct. 1401, 3 L.Ed.2d 5 (1958)—340.00
Cooper v. Pay-N-Save Drugs, Inc., 59 Wash. 2d 829, 371 P.2d 43 (1962)—12.03

Cooper Industries, Inc. v. Leatherman Tool Group, Inc., 532 U.S. 424, 121 S. Ct. 1678, 149 L. Ed. 2d 674 (2001)—348.02
Corbit v. J. I. Case Co., 70 Wash. 2d 522, 424 P.2d 290 (1967)—301.01, 301A.01
Cornejo v. State, 57 Wash. App. 314, 788 P.2d 554 (Div. 3 1990)—12.06, 31.03.01, 34.02
Cotton v. Kronenberg, 111 Wash. App. 258, 44 P.3d 878 (Div. 1 2002)—107.09, 107.10
Couch v. Mine Safety Appliances Co., 107 Wash. 2d 232, 728 P.2d 585, 78 A.L.R.4th 139 (1986)—110.01, 110.02, 110.02.02, 110.02.03
Coulson v. Huntsman Packaging Products Inc., 121 Wash. App. 941, 92 P.3d 278 (Div. 1 2004)—135.01
Coulter v. Asten Group, Inc., 135 Wash. App. 613, 146 P.3d 444 (Div. 1 2006)—110.00, 110.02.04, 110.30.02, 110.31.01.01, 110.31.01.02
Cousineau v. Microsoft Corp., 992 F. Supp. 2d 1116 (W.D. Wash. 2012)—310.06
Coventry Associates v. American States Ins. Co., 136 Wash. 2d 269, 961 P.2d 933 (1998)—320.02, 320.04
Coville v. Cobarc Services, Inc., 73 Wash. App. 433, 869 P.2d 1103 (Div. 3 1994)—330.05, 330.23
Cox v. Hugo, 52 Wash. 2d 815, 329 P.2d 467 (1958)—11.06
Cox v. Keg Restaurants U.S., Inc., 86 Wash. App. 239, 935 P.2d 1377 (Div. 1 1997)—15.05, 33.01, 33.02, 370.01, 370.02, 370.05, 370.06
Cox v. Lewiston Grain Growers, Inc., 86 Wash. App. 357, 936 P.2d 1191, 33 U.C.C. Rep. Serv. 2d 443 (Div. 3 1997)—310.02
Cox v. Spangler, 141 Wash. 2d 431, 5 P.3d 1265 (2000)—11.01, 30.01.01
Coyle v. Municipality of Metropolitan Seattle, 32 Wash. App. 741, 649 P.2d 652 (Div. 1 1982)—100.01
Coyle v. Municipality of Metro. Seattle, 32 Wn.App. 741,747, 649 P.2d 652 (1982)—10.01
Crace, In re, 174 Wash. 2d 835, 280 P.3d 1102 (2012)—107.00
Cramer v. Department of Highways, 73 Wash. App. 516, 870 P.2d 999 (Div. 1 1994)—15.05
Cramer v. Mengerhausen, 275 Or. 223, 550 P.2d 740 (1976)—22.01
Crawford v. Miller, 18 Wash. App. 151, 566 P.2d 1264 (Div. 1 1977)—70.09
Cregan v. Fourth Memorial Church, 175 Wash. 2d 279, 285 P.3d 860 (2012)—120.07
Criscuola v. Andrews, 82 Wash. 2d 68, 507 P.2d 149 (1973)—31.01.01
Crittenden v. Fibreboard Corp., 58 Wash. App. 649, 794 P.2d 554 (Div. 1 1990)—110.02
Crowe v. Gaston, 134 Wash. 2d 509, 951 P.2d 1118 (1998)—15.05, 370.07, 370.09, 370.11, 370.12
CSX Transp., Inc. v. McBride, 564 U.S. 685, 131 S. Ct. 2630, 180 L. Ed. 2d 637 (2011)—340.06
Cudney v. ALSCO, Inc., 172 Wash. 2d 524, 259 P.3d 244 (2011)—330.50, 330.51

Cultee v. City of Tacoma, 95 Wash. App. 505, 977 P.2d 15 (Div. 2 1999)—120.04, 120.07
Cultum v. Heritage House Realtors, Inc., 103 Wash. 2d 623, 694 P.2d 630 (1985)—107.04
Cummings v. Guardianship Services of Seattle, 128 Wash. App. 742, 110 P.3d 796 (Div. 1 2005)—107.02, 107.10, 165.04
Cunningham v. Town of Tieton, 60 Wash. 2d 434, 374 P.2d 375 (1962)—1.02, 150.15
Currier v. Northland Services, Inc., 182 Wash. App. 733, 332 P.3d 1006 (Div. 1 2014)—330.01.01, 330.05
Curtis v. Lein, 169 Wash. 2d 884, 239 P.3d 1078 (2010)—22.01, 130.00, 130.01, 130.02

D

Dabroe v. Rhodes Co., 64 Wash. 2d 431, 392 P.2d 317 (1964)—20.01, 100.01, 100.02
Dadd v. Anoka County, 827 F.3d 749 (8th Cir. 2016)—343.00
Daggett v. Tiffany, 2 Wash. App. 309, 467 P.2d 629 (Div. 3 1970)—120.04
Dahl v. Wagner, 87 Wash. 492, 151 P. 1079 (1915)—33.02
Dailey v. Lange, 20 Wash. App. 12, 578 P.2d 1322 (Div. 1 1978)—70.03.04, 71.04
Dailey v. North Coast Life Ins. Co., 129 Wash. 2d 572, 919 P.2d 589 (1996)—35.01
Daley v. Stephens, 64 Wash. 2d 806, 394 P.2d 801 (1964)—70.03, 70.03.02
Dalton v. State, 130 Wash. App. 653, 124 P.3d 305 (Div. 3 2005)—160.02
Daly-Murphy v. Winston, 837 F.2d 348, 9 Fed. R. Serv. 3d 1161 (9th Cir. 1987)—340.00, 340.01
Daly v. Lynch, 24 Wash. App. 69, 600 P.2d 592 (Div. 2 1979)—6.13
Dang v. Cross, 422 F.3d 800 (9th Cir. 2005)—348.02
Daniels v. Williams, 474 U.S. 327, 106 S.Ct. 662, 88 L.Ed.2d 662 (1986)—343.07
Darnell v. Pineiro, 849 F.3d 17 (2d Cir. 2017)—343.00, 343.05, 343.07
Daugert v. Pappas, 104 Wash. 2d 254, 704 P.2d 600 (1985)—15.02, 107.07
Dauphin v. Smith, 42 Wash. App. 491, 713 P.2d 116 (Div. 2 1986)—352.04, 352.06
Dave Johnson Ins., Inc. v. Wright, 167 Wash. App. 758, 275 P.3d 339 (Div. 2 2012)—165.05
Davenport v. Washington Educ. Ass'n, 147 Wash. App. 704, 197 P.3d 686, 239 Ed. Law Rep. 715 (Div. 2 2008)—303.08
Davey v. Brownson, 3 Wash. App. 820, 478 P.2d 258, 50 A.L.R.3d 1182 (Div. 3 1970)—301.08
Davidson v. Hensen, 135 Wash. 2d 112, 954 P.2d 1327 (1998)—352.01, 352.02
Davis v. Bader, 57 Wash. 2d 871, 360 P.2d 352 (1961)—10.03, 12.06

Davis v. Browne, 20 Wash. 2d 219, 147 P.2d 263 (1944)—72.05
Davis v. Davis Wright Tremaine, L.L.P., 103 Wash. App. 638, 14 P.3d 146 (Div. 1 2000)—107.00
Davis v. Department of Labor and Industries, 94 Wash. 2d 119, 615 P.2d 1279 (1980)—160.02, 330.01, 330.01.02, 330.05
Davis v. Fred's Appliance, Inc., 171 Wash. App. 348, 287 P.3d 51 (Div. 3 2012)—330.23
Davis v. Mason County, 927 F.2d 1473, 33 Fed. R. Evid. Serv. 825, 19 Fed. R. Serv. 3d 952 (9th Cir. 1991)—348.02
Davis v. Microsoft Corp., 149 Wash. 2d 521, 70 P.3d 126 (2003)—330.00, 330.32, 330.34, 330.37
Davis v. State, 144 Wash. 2d 612, 30 P.3d 460 (2001)—120.07
Davis v. Taylor, 132 Wn.App. 515, 132 P.3d 783 (2006)—380.00
Davis v. West One Automotive Group, 140 Wash. App. 449, 166 P.3d 807 (Div. 3 2007)—330.00, 330.01.02, 330.05
DC Farms, LLC v. Conagra Foods Lamb Weston, Inc., 179 Wash. App. 205, 317 P.3d 543 (Div. 3 2014)—302.03
Dean v. Municipality of Metropolitan Seattle-Metro, 104 Wash. 2d 627, 708 P.2d 393 (1985)—330.34, 330.81
Dedman v. Washington Personnel Appeals Board, 98 Wash. App. 471, 989 P.2d 1214 (Div. 2 1999)—330.32
Deegan v. Windermere Real Estate/Center-Isle, Inc., 197 Wash. App. 875, 391 P.3d 582 (Div. 1 2017)—310.07, 310.08
Degel v. Majestic Mobile Manor, Inc., 129 Wash. 2d 43, 914 P.2d 728 (1996)—120.04
DeHeer v. Seattle Post-Intelligencer, 60 Wash. 2d 122, 372 P.2d 193 (1962)—120.06
DeHorney v. Bank of America Nat. Trust and Sav. Ass'n, 879 F.2d 459 (9th Cir. 1989)—330.00
Del Rosario v. Del Rosario, 152 Wash. 2d 375, 97 P.3d 11 (2004)—301.08
Demery v. Arpaio, 378 F.3d 1020 (9th Cir. 2004)—342.03
Deming, Matter of, 108 Wash. 2d 82, 736 P.2d 639 (1987)—160.02, 165.05
Denaxas v. Sandstone Court of Bellevue, L.L.C., 148 Wash. 2d 654, 63 P.3d 125 (2003)—301.08, 301.09
Denman v. City of Tacoma, 148 Wash. 314, 268 P. 1043 (1928)—151.01
Dennis v. Department of Labor and Industries of State of Wash., 109 Wash. 2d 467, 745 P.2d 1295 (1987)—155.06, 155.20, 155.30
Department of Labor and Industries of the State of Wash. v. Landon, 117 Wash. 2d 122, 814 P.2d 626 (1991)—155.08
Dept. of Ecology, State ex rel. v. Anderson, 94 Wash. 2d 727, 620 P.2d 76 (1980)—301A.01
Derheim v. N. Fiorito Co., 80 Wash. 2d 161, 492 P.2d 1030 (1972)—70.08, 71.04
DeShaney v. Winnebago County Dept. of Social Services, 489 U.S. 189, 109 S. Ct. 998, 103 L. Ed. 2d 249 (1989)—340.06, 343.00

Detention of Aston, In re, 161 Wash. App. 824, 251 P.3d 917 (Div. 1 2011)—365.15
Detention of Bergen, In re, 146 Wash. App. 515, 195 P.3d 529 (Div. 1 2008)—365.31
Detention of Boynton, In re, 152 Wash. App. 442, 216 P.3d 1089 (Div. 1 2009)—365.16
Detention of Brooks, In re, 145 Wash. 2d 275, 36 P.3d 1034 (2001)—365.00, 365.10
Detention of Broten, In re, 115 Wash. App. 252, 62 P.3d 514 (Div. 2 2003)—365.15
Detention of Brown, In re, 154 Wash. App. 116, 225 P.3d 1028, 56 A.L.R.6th 851 (Div. 1 2010)—365.10
Detention of Davis, In re, 109 Wash. App. 734, 37 P.3d 325 (Div. 1 2002)—365.15
Detention of D.F.F., In re, 172 Wash. 2d 37, 256 P.3d 357 (2011)—360.01
Detention of Dydasco, Matter of, 135 Wash. 2d 943, 959 P.2d 1111 (1998)—360.05
Detention of Elmore, In re, 162 Wash. 2d 27, 168 P.3d 1285 (2007)—365.34
Detention of Fair, In re, 167 Wash. 2d 357, 219 P.3d 89 (2009)—365.10
Detention of Greenwood, In re, 130 Wash. App. 277, 122 P.3d 747 (Div. 2 2005)—360.01
Detention of Halgren, In re, 156 Wash. 2d 795, 132 P.3d 714 (2006)—365.00, 365.10
Detention of Halgren, In reHalgren, 156 Wash. 2d 795, 132 P.3d 714 (2006)—365.31
Detention of Henrickson v. State, 140 Wash. 2d 686, 2 P.3d 473 (2000)—365.10, 365.15
Detention of Hovinga, In re, 132 Wash. App. 16, 130 P.3d 830 (Div. 1 2006)—365.10
Detention of Jones, In re, 149 Wash. App. 16, 201 P.3d 1066 (Div. 1 2009)—365.00, 365.31
Detention of Marshall, In re, 122 Wash. App. 132, 90 P.3d 1081 (Div. 2 2004)—365.03
Detention of Marshall v. State, 156 Wash. 2d 150, 125 P.3d 111 (2005)—365.10
Detention of Moore, In re, 167 Wash. 2d 113, 216 P.3d 1015 (2009)—365.10, 365.14, 365.15
Detention of Paschke v. State, 121 Wash. App. 614, 90 P.3d 74 (Div. 3 2004)—365.10
Detention of Pouncy, In re, 168 Wash. 2d 382, 229 P.3d 678 (2010)—365.11, 365.12.01
Detention of Pouncy, In re, 144 Wash. App. 609, 184 P.3d 651 (Div. 1 2008)—365.00, 365.10
Detention of Reimer, In re, 146 Wash. App. 179, 190 P.3d 74 (Div. 2 2008)—365.31

Detention of Reyes, In re, 184 Wash. 2d 340, 358 P.3d 394 (2015)—365.00
Detention of R.H., In re, 178 Wash. App. 941, 316 P.3d 535 (Div. 2 2014)—360.05
Detention of R.S., In re, 124 Wash. 2d 766, 881 P.2d 972 (1994)—360.10
Detention of Rushton, In re, 190 Wash. App. 358, 359 P.3d 935 (Div. 3 2015)—365.00
Detention of R.W., In re, 98 Wash. App. 140, 988 P.2d 1034 (Div. 2 1999)—360.13.01
Detention of Savala, In re, 147 Wash. App. 798, 199 P.3d 413 (Div. 3 2008)—365.00
Detention of Sease, In re, 149 Wash. App. 66, 201 P.3d 1078 (Div. 2 2009)—365.00, 365.10, 365.31
Detention of Thorell, In re, 149 Wash. 2d 724, 72 P.3d 708 (2003)—365.00, 365.10, 365.14, 365.31
Detention of Turay, In re, 139 Wash. 2d 379, 986 P.2d 790 (1999)—365.10
Detention of Williams, In re, 147 Wash. 2d 476, 55 P.3d 597 (2002)—365.01
Devenpeck v. Alford, 543 U.S. 146, 125 S. Ct. 588, 160 L. Ed. 2d 537 (2004)—342.08, 342.09
Deville v. Marcantel, 567 F.3d 156 (5th Cir. 2009)—340.06
Dewar v. Smith, 185 Wash. App. 544, 342 P.3d 328 (Div. 1 2015)—165.01
DeWater v. State, 130 Wash. 2d 128, 921 P.2d 1059 (1996)—50.11, 50.11.01, 330.21, 330.22
Dexheimer v. CDS, Inc., 104 Wash. App. 464, 17 P.3d 641 (Div. 3 2001)—130.06
Diaz v. Washington State Migrant Council, 165 Wash. App. 59, 265 P.3d 956 (Div. 3 2011)—5.01
DiBlasi v. City of Seattle, 136 Wash. 2d 865, 969 P.2d 10 (1998)—380.06
Dickerson v. Chadwell, Inc., 62 Wash. App. 426, 814 P.2d 687 (Div. 1 1991)—370.01
Dickinson v. Edwards, 105 Wash. 2d 457, 716 P.2d 814 (1986)—50.02, 370.01, 370.02
Dicomes v. State, 113 Wash. 2d 612, 782 P.2d 1002 (1989)—14.03.01
Dinner v. Thorp, 54 Wash. 2d 90, 338 P.2d 137 (1959)—105.02
Dinnis v. Department of Labor and Industries, 67 Wash. 2d 654, 409 P.2d 477 (1965)—155.11
Dinsmore Sawmill Co. v. Falls City Lumber Co., 70 Wash. 42, 126 P. 72 (1912)—301.07
Disciplinary Proceeding Against Egger, In re, 152 Wash. 2d 393, 98 P.3d 477 (2004)—107.01
Disciplinary Proceeding Against Shepard, In re, 169 Wash. 2d 697, 239 P.3d 1066 (2010)—107.04
Disciplinary Proceedings Against Dann, Matter of, 136 Wash. 2d 67, 960 P.2d 416 (1998)—107.09

District of Columbia Court of Appeals v. Feldman, 460 U.S. 462, 103 S. Ct. 1303, 75 L. Ed. 2d 206 (1983)—340.00
Dixon v. Haynes, 146 Wash. 163, 262 P. 119, 55 A.L.R. 1218 (1927)—50.14
D.L.S. v. Maybin, 130 Wash. App. 94, 121 P.3d 1210 (Div. 1 2005)—105.02.03
Doe v. Boeing Co., 121 Wash. 2d 8, 846 P.2d 531 (1993)—330.34, 330.36
Doe v. Corporation of President of Church of Jesus Christ of Latter-Day Saints, 141 Wash. App. 407, 167 P.3d 1193 (Div. 1 2007)—14.03.02, 15.04
Doernbecher v. Mutual Life Ins. Co. of New York, 16 Wash. 2d 64, 132 P.2d 751 (1943)—301.10
Doherty v. Municipality of Metropolitan Seattle, 83 Wash. App. 464, 921 P.2d 1098 (Div. 2 1996)—70.02.01
Donahue v. Central Washington University, 140 Wash. App. 17, 163 P.3d 801, 221 Ed. Law Rep. 897 (Div. 3 2007)—15.02
Donald B. Murphy Contractors, Inc. v. King County, 112 Wash. App. 192, 49 P.3d 912 (Div. 1 2002)—302.11
Donaldson v. Greenwood, 40 Wash. 2d 238, 242 P.2d 1038 (1952)—150.08
Donato v. United Grain Corp., 18 Wash. App. 880, 573 P.2d 811 (Div. 2 1977)—100.02
Doolittle v. City of Everett, 114 Wash. 2d 88, 786 P.2d 253 (1990)—150.06
Dormaier ex rel. Dormaier, Estate of v. Columbia Basin Anesthesia, P.L.L.C., 177 Wash. App. 828, 313 P.3d 431 (Div. 3 2013)—105.09
Dorr v. Big Creek Wood Products, Inc., 84 Wash. App. 420, 927 P.2d 1148 (Div. 1 1996)—12.06, 13.03, 120.03
Dotson v. Haddock, 46 Wash. 2d 52, 278 P.2d 338 (1955)—120.08, 120.08.01
Douglas v. Bussabarger, 73 Wash. 2d 476, 438 P.2d 829 (1968)—105.01
Douglas v. Freeman, 117 Wash. 2d 242, 814 P.2d 1160 (1991)—105.02.02
Douglas v. Jepson, 88 Wash. App. 342, 945 P.2d 244 (Div. 1 1997)—50.12
Dowell v. Department of Labor and Industries, 51 Wash. 2d 428, 319 P.2d 843 (1957)—155.08
Downs v. Smith, 169 Wash. 203, 13 P.2d 440 (1932)—300.02
Dragt v. Dragt/DeTray, LLC, 139 Wash. App. 560, 161 P.3d 473 (Div. 2 2007)—301.07
D.T. by M.T. v. Independent School Dist. No. 16 of Pawnee County, Okl., 894 F.2d 1176, 58 Ed. Law Rep. 483 (10th Cir. 1990)—341.02
Dubner v. City and County of San Francisco, 266 F.3d 959 (9th Cir. 2001)—342.09
Duncan v. Cessna Aircraft Co., 665 S.W.2d 414 (Tex. 1984)—110.02.03
Dunn v. Harmon, 5 Wash. App. 87, 486 P.2d 103 (Div. 2 1971)—70.02.02
Dunnington v. Virginia Mason Medical Center, 187 Wash. 2d 629, 389 P.3d 498 (2017)—15.02, 105.09

Duval v. Inland Nav. Co., 90 Wash. 149, 155 P. 768 (1916)—100.09
Dwinell's Central Neon v. Cosmopolitan Chinook Hotel, 21 Wash. App. 929, 587 P.2d 191 (Div. 3 1978)—300.02

E

Eagle Group, Inc. v. Pullen, 114 Wash. App. 409, 58 P.3d 292 (Div. 2 2002)—351.01
Easley v. Sea-Land Service, Inc., 99 Wash. App. 459, 994 P.2d 271 (Div. 1 2000)—330.32, 330.36, 330.37
Eastvold, State ex rel. v. Yelle, 46 Wash. 2d 166, 279 P.2d 645 (1955)—150.07
Eastwood v. Horse Harbor Foundation, Inc., 170 Wash. 2d 380, 241 P.3d 1256 (2010)—165.00, 165.03, 165.03.01
Eaton v. Engelcke Mfg., Inc., 37 Wash. App. 677, 681 P.2d 1312 (Div. 1 1984)—301.02
Ebling v. Gove's Cove, Inc., 34 Wash. App. 495, 663 P.2d 132 (Div. 1 1983)—301.07, 330.00
Ebsary v. Pioneer Human Services, 59 Wash. App. 218, 796 P.2d 769 (Div. 1 1990)—31.03.01
Edgar v. State, 92 Wash. 2d 217, 595 P.2d 534 (1979)—340.00
Ed Nowogroski Ins., Inc. v. Rucker, 137 Wash. 2d 427, 971 P.2d 936 (1999)—351.01, 351.02, 351.03, 351.05
Edwards v. Department of Labor & Industries, 43 Wash. App. 480, 717 P.2d 1377 (Div. 1 1986)—155.10
Eelbode v. Chec Medical Centers, Inc., 97 Wash. App. 462, 984 P.2d 436 (Div. 2 1999)—105.01
E.E.O.C. v. Abercrombie & Fitch Stores, Inc., 135 S. Ct. 2028, 192 L. Ed. 2d 35 (2015)—330.00
Egan v. Cauble, 92 Wash. App. 372, 966 P.2d 362 (Div. 2 1998)—13.03
Egbert v. Nissan Motor Co., Ltd., 2010 UT 8, 228 P.3d 737 (Utah 2010)—110.02.03
Egede-Nissen v. Crystal Mountain, Inc., 93 Wash. 2d 127, 606 P.2d 1214 (1980)—20.01, 120.00, 120.02.01, 120.03, 120.05, 120.06, 120.07
Elber v. Larson, 142 Wash. App. 243, 173 P.3d 990 (Div. 3 2007)—105.01, 105.02
Elcon Const., Inc. v. Eastern Washington University, 174 Wash. 2d 157, 273 P.3d 965, 278 Ed. Law Rep. 609 (2012)—165.00
Ellis v. Department of Labor and Industries, 88 Wash. 2d 844, 567 P.2d 224 (1977)—155.08
Ellis v. City of Seattle, 142 Wash. 2d 450, 13 P.3d 1065 (2000)—330.05
Ellis v. William Penn Life Assur. Co. of America, 124 Wash. 2d 1, 873 P.2d 1185 (1994)—302.05
Ellorin v. Applied Finishing, Inc., 996 F. Supp. 2d 1070 (W.D. Wash. 2014)—330.22
Ellwein v. Hartford Acc. and Indem. Co., 142 Wash. 2d 766, 15 P.3d 640 (2001)—320.00, 320.03, 320.04
Ellwein v. Hartford Acc. and Indem. Co., 95 Wash. App. 419, 976 P.2d 138 (Div. 1 1999)—70.02.01

Emerick v. Raleigh Hills Hospital, 133 Cal. App. 3d 575, 184 Cal. Rptr. 92 (4th Dist. 1982)—22.01
Emrich v. Connell, 105 Wash. 2d 551, 716 P.2d 863 (1986)—301.06
Endicott v. Saul, 142 Wash. App. 899, 176 P.3d 560 (Div. 1 2008)—165.04, 301.11
Enersen v. Anderson, 55 Wash. 2d 486, 348 P.2d 401 (1960)—120.06
Enoch v. Spokane Falls & N. Ry. Co., 6 Wash. 393, 33 P. 966 (1893)—150.07
Ensley v. Mollmann, 155 Wash. App. 744, 230 P.3d 599 (Div. 1 2010)—370.01, 370.01.01
Enyeart v. Borgeson, 60 Wash. 2d 494, 374 P.2d 543 (1962)—21.07
Epperly v. City of Seattle, 65 Wash. 2d 777, 399 P.2d 591 (1965)—50.11
Erdman v. Lower Yakima Valley, Washington Lodge No. 2112 of B.P.O.E., 41 Wash. App. 197, 704 P.2d 150 (Div. 3 1985)—120.06.02
Erie v. White, 92 Wash. App. 297, 966 P.2d 342 (Div. 2 1998)—13.03
Eriks v. Denver, 118 Wash. 2d 451, 824 P.2d 1207 (1992)—107.04, 107.08, 107.09, 107.10
Erlich v. Glasner, 418 F.2d 226 (9th Cir. 1969)—340.01
Erwin v. Roundup Corp., 110 Wash. App. 308, 40 P.3d 675 (Div. 3 2002)—330.36
ESCA Corp. v. KPMG Peat Marwick, 135 Wash. 2d 820, 959 P.2d 651 (1998)—165.00, 165.01
Esparza v. Skyreach Equipment, Inc., 103 Wash. App. 916, 15 P.3d 188 (Div. 1 2000)—21.10, 34.02
Estelle v. Gamble, 429 U.S. 97, 97 S. Ct. 285, 50 L. Ed. 2d 251 (1976)—343.02, 343.03, 343.04, 343.06
Estevez v. Faculty Club of University of Washington, 129 Wash. App. 774, 120 P.3d 579 (Div. 1 2005)—330.05, 330.23
Eugster v. City of Spokane, 121 Wash. App. 799, 91 P.3d 117 (Div. 3 2004)—352.03
Eugster v. Washington State Bar Association, 198 Wash. App. 758, 397 P.3d 131 (Div. 3 2017)—340.00
Evans v. Yakima Valley Transp. Co., 39 Wash. 2d 841, 239 P.2d 336 (1952)—100.01, 100.09
Evers v. Broadview Dairy Co., 147 Wash. 570, 266 P. 726 (1928)—30.13
Exxon Mobil Corp. v. Saudi Basic Industries Corp., 544 U.S. 280, 125 S. Ct. 1517, 161 L. Ed. 2d 454 (2005)—340.00
Exxon Shipping Co. v. Baker, 554 U.S. 471, 128 S. Ct. 2605, 171 L. Ed. 2d 570 (2008)—35.01

F

Fabrique v. Choice Hotels Intern., Inc., 144 Wash. App. 675, 183 P.3d 1118 (Div. 3 2008)—15.01, 15.02
Faciszewski v. Brown, 187 Wash. 2d 308, 386 P.3d 711 (2016)—130.00
Fagerdahl v. North Coast Transp. Co., 178 Wash. 482, 35 P.2d 46 (1934)—100.08
Fagg v. Bartells Asbestos Settlement Trust, 184 Wash. App. 804, 339 P.3d 207 (Div. 1 2014)—110.00

Fairbanks v. J.B. McLoughlin Co., Inc., 131 Wash. 2d 96, 929 P.2d 433 (1997)—370.01, 370.02
Falconer v. Safeway Stores, Inc., 49 Wash. 2d 478, 303 P.2d 294 (1956)—120.06.02
Falk v. Keene Corp., 113 Wash. 2d 645, 782 P.2d 974 (1989)—110.01, 110.02, 110.03.01
Family Medical Bldg., Inc. v. State, Dept. of Social & Health Services, 104 Wash. 2d 105, 702 P.2d 459 (1985)—303.01, 303.03, 303.06
Family Medical Bldg., Inc. v. State, Dept. of Social & Health Services, 37 Wash. App. 662, 684 P.2d 77 (Div. 3 1984)—301A.02
Farah v. Hertz Transporting, Inc., 196 Wash. App. 171, 383 P.3d 552 (Div. 1 2016)—330.01
Farm Crop Energy, Inc. v. Old Nat. Bank of Washington, 109 Wash. 2d 923, 750 P.2d 231 (1988)—301A.01, 303.04, 303.05
Farm Crop Energy, Inc. v. Old Nat. Bank of Washington, 38 Wash. App. 50, 685 P.2d 1097 (Div. 3 1984)—301A.01
Farmer v. Brennan, 511 U.S. 825, 114 S. Ct. 1970, 128 L. Ed. 2d 811 (1994)—341.04, 343.00, 343.02, 343.03, 343.04, 343.05, 343.06
Farmers Ins. Co. of Washington v. Waxman Industries, Inc., 132 Wash. App. 142, 130 P.3d 874 (Div. 1 2006)—110.04
Farrow v. Ostrom, 10 Wash. 2d 666, 117 P.2d 963 (1941)—70.03.03
Faust v. Albertson, 167 Wash. 2d 531, 222 P.3d 1208 (2009)—370.01, 370.02
Faust v. Albertson, 143 Wash. App. 272, 178 P.3d 358 (Div. 1 2008)—370.01.01
Favor v. Department of Labor and Industries, 53 Wash. 2d 698, 336 P.2d 382 (1959)—155.06
Favors v. Matzke, 53 Wash. App. 789, 770 P.2d 686 (Div. 1 1989)—165.04
Federal Signal Corp. v. Safety Factors, Inc., 125 Wash. 2d 413, 886 P.2d 172, 25 U.C.C. Rep. Serv. 2d 765 (1994)—330.83
Federal Way, City of v. Public Employment Relations Com'n, 93 Wash. App. 509, 970 P.2d 752 (Div. 1 1998)—15.02
Fell v. Spokane Transit Authority, 128 Wash. 2d 618, 911 P.2d 1319 (1996)—15.02
Felt v. McCarthy, 130 Wash. 2d 203, 922 P.2d 90 (1996)—302.10
Felt v. McCarthy, 78 Wash. App. 362, 898 P.2d 315 (Div. 1 1995)—302.10
Fergen v. Sestero, 182 Wash. 2d 794, 346 P.3d 708 (2015)—105.08
Fernandez v. California, 571 U.S. 292, 134 S. Ct. 1126, 188 L. Ed. 2d 25 (2014)—342.06
Fernandez v. State, ex rel. Dept. of Highways, 49 Wash. App. 28, 741 P.2d 1010 (Div. 2 1987)—120.01
Fey v. State, 174 Wash. App. 435, 300 P.3d 435 (Div. 3 2013)—330.32, 330.34, 330.37
Fidelity Mort. Corp. v. Seattle Times Co., 131 Wash. App. 462, 128 P.3d 621 (Div. 1 2005)—310.07, 310.09

Fielder v. Sterling Park Homeowners Ass'n, 914 F. Supp. 2d 1222 (W.D. Wash. 2012)—10.07
Finch v. Carlton, 84 Wash. 2d 140, 524 P.2d 898 (1974)—301.08
First Union Management, Inc. v. Slack, 36 Wash. App. 849, 679 P.2d 936 (Div. 2 1984)—302.07
Fisher v. Parkview Properties, Inc., 71 Wash. App. 468, 859 P.2d 77 (Div. 2 1993)—352.01
Fisher v. Tacoma School Dist. No. 10, 53 Wash. App. 591, 769 P.2d 318, 52 Ed. Law Rep. 328 (Div. 2 1989)—330.00, 330.21
Fitzell v. Rama Industries, Inc., 416 So. 2d 1246 (Fla. 4th DCA 1982)—6.20
Flint v. Hart, 82 Wash. App. 209, 917 P.2d 590 (Div. 3 1996)—107.08
Florence v. Board of Chosen Freeholders of County of Burlington, 566 U.S. 318, 132 S. Ct. 1510, 182 L. Ed. 2d 566 (2012)—343.00
Flores v. County of Los Angeles, 758 F.3d 1154 (9th Cir. 2014)—341.02
Florida v. Bostick, 501 U.S. 429, 111 S. Ct. 2382, 115 L. Ed. 2d 389 (1991)—342.02, 342.10
Florida v. Jardines, 569 U.S. 1, 133 S. Ct. 1409, 185 L. Ed. 2d 495 (2013)—342.04
Florida v. Royer, 460 U.S. 491, 103 S. Ct. 1319, 75 L. Ed. 2d 229 (1983)—342.10
Flower v. T.R.A. Industries, Inc., 127 Wash. App. 13, 111 P.3d 1192 (Div. 3 2005)—301A.01
Flyte v. Summit View Clinic, 183 Wash. App. 559, 333 P.3d 566 (Div. 2 2014)—2.13, 105.04
Fochtman v. Department of Labor and Industries, 7 Wash. App. 286, 499 P.2d 255 (Div. 2 1972)—155.07, 155.08
Foisy v. Wyman, 83 Wash. 2d 22, 515 P.2d 160 (1973)—130.06
Foran v. Kallio, 56 Wash. 2d 769, 355 P.2d 544 (1960)—72.05
Ford v. Chaplin, 61 Wash. App. 896, 812 P.2d 532 (Div. 1 1991)—15.01
Ford v. Red Lion Inns, 67 Wash. App. 766, 840 P.2d 198 (Div. 1 1992)—120.00, 120.05, 120.07
Ford v. Trendwest Resorts, Inc., 146 Wash. 2d 146, 43 P.3d 1223 (2002)—303.01, 303.03
Ford, Estate of v. Ramirez-Palmer, 301 F.3d 1043 (9th Cir. 2002)—343.02, 343.06
Fortson-Kemmerer v. Allstate Insurance Company, 198 Wash. App. 387, 393 P.3d 849 (Div. 3 2017)—320.00, 320.03, 320.04
Foster v. California, 394 U.S. 440, 89 S. Ct. 1127, 22 L. Ed. 2d 402 (1969)—341.04
Foster, In re Estate of, 55 Wash. App. 545, 779 P.2d 272 (Div. 1 1989)—110.05
Foucha v. Louisiana, 504 U.S. 71, 112 S. Ct. 1780, 118 L. Ed. 2d 437 (1992)—360.04, 360.05, 360.21, 360.22
Fox v. Evans, 127 Wash. App. 300, 111 P.3d 267 (Div. 1 2005)—33.02
Francom v. Costco Wholesale Corp., 98 Wash. App. 845, 991 P.2d 1182 (Div. 3 2000)—330.05, 330.24

Franklin County Sheriff's Office v. Sellers, 97 Wash. 2d 317, 646 P.2d 113 (1982)—330.04
Franks v. Department of Labor & Industries, 35 Wash. 2d 763, 215 P.2d 416 (1950)—155.08
Fredrickson v. Bertolino's Tacoma, Inc., 131 Wash. App. 183, 127 P.3d 5 (Div. 2 2005)—120.06.02
Frias v. Asset Foreclosure Services, Inc., 181 Wash. 2d 412, 334 P.3d 529 (2014)—310.06
Frick v. Washington Water Power Co., 76 Wash. 12, 135 P. 470 (1913)—20.01
Frisino v. Seattle School Dist. No. 1, 160 Wash. App. 765, 249 P.3d 1044, 265 Ed. Law Rep. 1245 (Div. 1 2011)—330.34
Frobig v. Gordon, 124 Wash. 2d 732, 881 P.2d 226 (1994)—130.01
Frost v. Agnos, 152 F.3d 1124, 41 Fed. R. Serv. 3d 538 (9th Cir. 1998)—343.00
Fry v. O'Leary, 141 Wash. 465, 252 P. 111, 49 A.L.R. 1249 (1927)—151.01
F.T.C. v. Sperry & Hutchinson Co., 405 U.S. 233, 92 S. Ct. 898, 31 L. Ed. 2d 170 (1972)—310.08
Fuller v. Rosinski, 79 Wash. 2d 719, 488 P.2d 1061 (1971)—302.02

G

Gaasland Co. v. Hyak Lumber & Millwork, Inc., 42 Wash. 2d 705, 257 P.2d 784 (1953)—303.04
Gabl v. Alaska Loan & Inv. Co., 6 Wash. App. 880, 496 P.2d 548 (Div. 1 1972)—130.00
Gaglidari v. Denny's Restaurants, Inc., 117 Wash. 2d 426, 815 P.2d 1362 (1991)—303.01
Gaines v. Department of Labor and Industries, 1 Wash. App. 547, 463 P.2d 269 (Div. 1 1969)—155.02
Gallamore v. City of Olympia, 34 Wash. 379, 75 P. 978 (1904)—30.01.04
Gammon v. Clark Equipment Co., 38 Wash. App. 274, 686 P.2d 1102 (Div. 1 1984)—20.01
Garcetti v. Ceballos, 547 U.S. 410, 126 S. Ct. 1951, 164 L. Ed. 2d 689 (2006)—340.06
Gardner v. Loomis Armored Inc., 128 Wash. 2d 931, 913 P.2d 377 (1996)—330.00, 330.50, 330.51
Garratt v. Dailey, 46 Wash. 2d 197, 279 P.2d 1091 (1955)—10.05
Gates v. Jensen, 92 Wash. 2d 246, 595 P.2d 919 (1979)—105.04
Gates v. Standard Brands Inc., 43 Wash. App. 520, 719 P.2d 130, 1 A.L.R.5th 987 (Div. 3 1986)—110.01.01
Gausvik v. Abbey, 126 Wash. App. 868, 107 P.3d 98 (Div. 2 2005)—15.01, 15.05, 340.06
Gayton v. McCoy, 593 F.3d 610, 81 Fed. R. Evid. Serv. 538 (7th Cir. 2010)—343.03, 343.04
Geer v. Tonnon, 137 Wash. App. 838, 155 P.3d 163 (Div. 1 2007)—107.04, 107.07

Geier v. American Honda Motor Co., Inc., 529 U.S. 861, 120 S. Ct. 1913, 146 L. Ed. 2d 914 (2000)—110.00
Geise v. Lee, 84 Wash. 2d 866, 529 P.2d 1054 (1975)—130.02
General Bldg. Contractors Ass'n, Inc. v. Pennsylvania, 458 U.S. 375, 102 S. Ct. 3141, 73 L. Ed. 2d 835 (1982)—340.00
Gentry v. Greyhound Corp., 46 Wash. 2d 631, 283 P.2d 979 (1955)—100.01
George v. City of Long Beach, 973 F.2d 706 (9th Cir. 1992)—340.02
Georgia v. Randolph, 547 U.S. 103, 126 S. Ct. 1515, 164 L. Ed. 2d 208 (2006)—342.06
Gerard v. Sacred Heart Medical Center, 86 Wash. App. 387, 937 P.2d 1104 (Div. 3 1997)—105.08
Gerberg v. Crosby, 52 Wash. 2d 792, 329 P.2d 184 (1958)—2.10
Gerimonte v. Case, 42 Wash. App. 611, 712 P.2d 876 (Div. 1 1986)—301.10, 301.11
Gerrard v. Craig, 122 Wash. 2d 288, 857 P.2d 1033 (1993)—41.04
Gerstein v. Pugh, 420 U.S. 103, 95 S. Ct. 854, 43 L. Ed. 2d 54, 19 Fed. R. Serv. 2d 1499 (1975)—342.03
Geschwind v. Flanagan, 121 Wash. 2d 833, 854 P.2d 1061 (1993)—11.01, 12.01, 16.03
Gianini v. Cerini, 100 Wash. 687, 171 P. 1007 (1918)—4.01
Gies v. Consolidated Freightways, 40 Wash. 2d 488, 244 P.2d 248 (1952)—15.05
Gilbert H. Moen Co. v. Island Steel Erectors, Inc., 75 Wash. App. 480, 878 P.2d 1246 (Div. 1 1994)—50.20
Gilbrook v. City of Westminster, 177 F.3d 839, 52 Fed. R. Evid. Serv. 363 (9th Cir. 1999)—340.06
Gildon v. Simon Property Group, Inc., 158 Wash. 2d 483, 145 P.3d 1196 (2006)—10.02
Gill v. Waggoner, 65 Wash. App. 272, 828 P.2d 55 (Div. 3 1992)—301.09
Gillette v. Delmore, 979 F.2d 1342 (9th Cir. 1992)—341.01
Gilliam v. Department of Social and Health Services, Child Protective Services, 89 Wash. App. 569, 950 P.2d 20 (Div. 1 1998)—50.02
Gilmartin v. Stevens Inv. Co., 43 Wn.2d 289, 261 P.2d 73 (1953)—303.03, 303.04
Gingrich v. Unigard Sec. Ins. Co., 57 Wash. App. 424, 788 P.2d 1096 (Div. 3 1990)—320.00
Ginochio v. Hesston Corp., 46 Wash. App. 843, 733 P.2d 551 (Div. 3 1987)—31.02.01
Gjerde v. Fritzsche, 55 Wash. App. 387, 777 P.2d 1072 (Div. 1 1989)—45.21
Glasgow v. Georgia-Pacific Corp., 103 Wash. 2d 401, 693 P.2d 708 (1985)—330.00, 330.21, 330.22, 330.23, 330.52
Gleason v. Cohen, 192 Wash. App. 788, 368 P.3d 531 (Div. 2 2016)—13.00, 13.03
Goehle v. Fred Hutchinson Cancer Research Center, 100 Wash. App. 609, 1 P.3d 579 (Div. 1 2000)—330.81.01, 330.81.02

Golden State Transit Corp. v. City of Los Angeles, 493 U.S. 103, 110 S. Ct. 444, 107 L. Ed. 2d 420 (1989)—340.00
Gomez v. Alexian Bros. Hosp. of San Jose, 698 F.2d 1019 (9th Cir. 1983)—340.01
Gomez v. Sauerwein, 180 Wash. 2d 610, 331 P.3d 19 (2014)—105.04
Goodman v. Boeing Co., 127 Wash. 2d 401, 899 P.2d 1265 (1995)—330.33, 330.34, 330.81
Goodman v. Boeing Co., 75 Wash. App. 60, 877 P.2d 703 (Div. 1 1994)—330.82
Goodpaster v. Pfizer, Inc., 35 Wash. App. 199, 665 P.2d 414 (Div. 1 1983)—301.02
Goodyear Tire & Rubber Co. v. Whiteman Tire, Inc., 86 Wash. App. 732, 935 P.2d 628 (Div. 3 1997)—165.04, 302.11
Gorge Lumber Co. v. Brazier Lumber Co., 6 Wash. App. 327, 493 P.2d 782, 10 U.C.C. Rep. Serv. 609 (Div. 2 1972)—302.07
Gosa v. Hyde, 117 Wash. 672, 202 P. 274 (1921)—30.06
Goucher v. J.R. Simplot Co., 104 Wash. 2d 662, 709 P.2d 774 (1985)—15.01, 15.04, 310.07
Grabos v. Loudin, 60 Wash. 2d 634, 374 P.2d 673 (1962)—71.05
Grader v. City of Lynnwood, 53 Wash. App. 431, 767 P.2d 952 (Div. 1 1989)—340.02
Graham v. Connor, 490 U.S. 386, 109 S. Ct. 1865, 104 L. Ed. 2d 443 (1989)—342.01, 342.02, 342.03, 343.00, 343.08
Graham v. Weyerhaeuser Co., 71 Wash. App. 55, 856 P.2d 717 (Div. 2 1993)—155.07.01
Grandstaff v. City of Borger, Tex., 767 F.2d 161 (5th Cir. 1985)—341.02
Grange Ins. Ass'n v. Ochoa Through Ochoa, 39 Wash. App. 90, 691 P.2d 248 (Div. 3 1984)—72.05
Grannum v. Berard, 70 Wash. 2d 304, 422 P.2d 812, 25 A.L.R.3d 1434 (1967)—24.03
Granville Condominium Homeowners Ass'n v. Kuehner, 177 Wash. App. 543, 312 P.3d 702 (Div. 2 2013)—301A.02
Grapp v. Peterson, 25 Wash. 2d 44, 168 P.2d 400 (1946)—70.04
Graves v. Department of Game, 76 Wash. App. 705, 887 P.2d 424 (Div. 3 1994)—330.05, 330.23
Graving v. Dorn, 63 Wash. 2d 236, 386 P.2d 621 (1963)—24.03
Gray v. City of Seattle, 29 Wash. 2d 428, 187 P.2d 310 (1947)—100.08
Gray v. Washington Water Power Co., 30 Wash. 665, 71 P. 206 (1903)—30.05
Grays Harbor County v. Bay City Lumber Co., 47 Wash. 2d 879, 289 P.2d 975 (1955)—35.01
Great Northern Ry. Co. v. State, 102 Wash. 348, 173 P. 40 (1918)—150.07
Greaves v. Medical Imaging Systems, Inc., 124 Wash. 2d 389, 879 P.2d 276 (1994)—301A.01
Green v. Floe, 28 Wash. 2d 620, 183 P.2d 771 (1947)—30.06
Green v. Interstate United Management Services Corp., 748 F.2d 827 (3d Cir. 1984)—301A.01

Greene v. Rothschild, 60 Wash. 2d 508, 374 P.2d 566 (1962)—20.01
Greenman v. Yuba Power Products, Inc., 59 Cal. 2d 57, 27 Cal. Rptr. 697, 377 P.2d 897, 13 A.L.R.3d 1049 (1963)—110.30.02
Greenwood v. Olympic, Inc., 51 Wash. 2d 18, 315 P.2d 295 (1957)—30.17, 30.18
Greer v. Northwestern Nat. Ins. Co., 109 Wash. 2d 191, 743 P.2d 1244 (1987)—320.00, 320.03, 320.05
Gregory v. City of Louisville, 444 F.3d 725, 2006 FED App. 0127P (6th Cir. 2006)—341.02, 341.04
Griffin v. Allstate Ins. Co., 108 Wash. App. 133, 29 P.3d 777 (Div. 1 2001)—320.02
Griffin v. Breckenridge, 403 U.S. 88, 91 S. Ct. 1790, 29 L. Ed. 2d 338 (1971)—340.00
Griffin v. Gehret, 17 Wash. App. 546, 564 P.2d 332 (Div. 1 1977)—11.05
Griffin v. West RS, Inc., 97 Wash. App. 557, 984 P.2d 1070 (Div. 1 1999)—120.06.03
Griffith v. Boise Cascade, Inc., 111 Wash. App. 436, 45 P.3d 589 (Div. 3 2002)—330.32, 330.34, 330.36
Griggs v. Duke Power Co., 401 U.S. 424, 91 S. Ct. 849, 28 L. Ed. 2d 158 (1971)—330.03
Grimsby v. Samson, 85 Wash. 2d 52, 530 P.2d 291, 77 A.L.R.3d 436 (1975)—14.03, 14.03.02
Grobe v. Valley Garbage Service, Inc., 87 Wash. 2d 217, 551 P.2d 748 (1976)—70.05
Groff v. Department of Labor and Industries, 65 Wash. 2d 35, 395 P.2d 633 (1964)—155.25
Groh v. Ramirez, 540 U.S. 551, 124 S. Ct. 1284, 157 L. Ed. 2d 1068 (2004)—340.06
Group Health Co-op. of Puget Sound, Inc. v. State Through Dept. of Revenue, 106 Wash. 2d 391, 722 P.2d 787 (1986)—365.03
Groves v. Meyers, 35 Wash. 2d 403, 213 P.2d 483 (1950)—71.04
Grundy v. Thurston County, 155 Wash. 2d 1, 117 P.3d 1089 (2005)—380.00, 380.01, 380.03
Guarino v. Interactive Objects, Inc., 122 Wash. App. 95, 86 P.3d 1175 (Div. 1 2004)—165.01, 165.02, 165.03, 165.04
Gulliford v. Pierce County, 136 F.3d 1345, 40 Fed. R. Serv. 3d 255 (9th Cir. 1998)—340.06
Gustafson v. Seattle Traction Co., 28 Wash. 227, 68 P. 721 (1902)—2.07
Gustav v. Seattle Urological Associates, 90 Wash. App. 785, 954 P.2d 319 (Div. 1 1998)—105.04

H

Haberman v. WPPSS, 109 Wn.2d 107, 744 P.2d 1032 (1987)—15.02
Hadaller v. Port of Chehalis, 97 Wash. App. 750, 986 P.2d 836 (Div. 2 1999)—302.02
Hadley v. Baxendale, 9 Ex. 341, 156 Eng. Rep. 145 (1854)—303.01, 303.04

Hale v. Wellpinit School Dist. No. 49, 165 Wash. 2d 494, 198 P.3d 1021 (2009)—330.00, 330.31
Hall v. King County Fire Dist. No. 43, 67 Wash. 2d 446, 408 P.2d 14 (1965)—71.01
Halvorsen v. Ferguson, 46 Wash. App. 708, 735 P.2d 675 (Div. 1 1986)—107.04
Halvorson v. Birchfield Boiler, Inc., 76 Wash. 2d 759, 458 P.2d 897 (1969)—370.01
Hamblet v. Soderburg, 189 Wash. 449, 65 P.2d 1267 (1937)—70.03.03
Hambleton, In re Estate of, 181 Wash. 2d 802, 335 P.3d 398 (2014)—302.05
Hamilton v. Department of Labor and Industries of State of Wash., 111 Wash. 2d 569, 761 P.2d 618 (1988)—155.13, 155.13.01
Hamilton v. State Farm Ins. Co., 83 Wash. 2d 787, 523 P.2d 193 (1974)—320.05
Hammel v. Rife, 37 Wash. App. 577, 682 P.2d 949 (Div. 1 1984)—12.06, 70.02.01, 70.02.06, 70.06
Ham, Yearsley & Ryrie v. Northern Pac. Ry. Co., 107 Wash. 378, 181 P. 898 (1919)—150.09
Handler v. Osman, 60 Wash. 2d 800, 376 P.2d 439 (1962)—12.03
Handlin v. On-Site Manager Inc., 187 Wash. App. 841, 351 P.3d 226 (Div. 1 2015)—310.06
Hanford Nuclear Reservation Litigation, In re, 780 F. Supp. 1551 (E.D. Wash. 1991)—380.02
Hangman Ridge Training Stables, Inc. v. Safeco Title Ins. Co., 105 Wash. 2d 778, 719 P.2d 531 (1986)—310.00, 310.01, 310.03, 310.06, 310.08, 310.09, 320.00
Hannaford v. Hornby, 53 Wash. 2d 565, 335 P.2d 473 (1959)—12.01
Hansch v. Hackett, 190 Wash. 97, 66 P.2d 1129 (1937)—50.04
Hansen v. Friend, 118 Wash. 2d 476, 824 P.2d 483 (1992)—60.03, 370.12
Hansen v. Horn Rapids O.R.V. Park of the City of Richland, 85 Wash. App. 424, 932 P.2d 724 (Div. 3 1997)—50.02.01
Hansen v. Transworld Wireless TV-Spokane, Inc., 111 Wash. App. 361, 44 P.3d 929, 47 U.C.C. Rep. Serv. 2d 460 (Div. 3 2002)—301.03
Hansen v. Virginia Mason Medical Center, 113 Wash. App. 199, 53 P.3d 60 (Div. 1 2002)—301.02
Hansen v. Wightman, 14 Wash. App. 78, 538 P.2d 1238 (Div. 1 1975)—107.09
Hansen, Matter of Estate of, 81 Wash. App. 270, 914 P.2d 127 (Div. 1 1996)—340.06
Hanson v. Anderson, 53 Wash. 2d 601, 335 P.2d 581 (1959)—70.01, 70.03.05
Hanson v. Freigang, 55 Wash. 2d 70, 345 P.2d 1109 (1959)—120.04
Harbor Plywood Corp. v. Department of Labor and Industries of State of Wash., 48 Wash. 2d 553, 295 P.2d 310 (1956)—155.20
Harkoff v. Whatcom County, 40 Wash. 2d 147, 241 P.2d 932 (1952)—150.06.02

Harlow v. Fitzgerald, 457 U.S. 800, 102 S. Ct. 2727, 73 L. Ed. 2d 396 (1982)—340.01
Harper v. City of Los Angeles, 533 F.3d 1010 (9th Cir. 2008)—340.06
Harper & Associates v. Printers, Inc., 46 Wash. App. 417, 730 P.2d 733, 3 U.C.C. Rep. Serv. 2d 594 (Div. 1 1986)—33.03
Harrell v. Washington State ex rel. Dept. of Social Health Services, 170 Wash. App. 386, 285 P.3d 159 (Div. 2 2012)—330.01.02, 330.34
Harrington v. Scribner, 785 F.3d 1299 (9th Cir. 2015)—343.00
Harris v. Forklift Systems, Inc., 510 U.S. 17, 114 S. Ct. 367, 126 L. Ed. 2d 295 (1993)—330.23
Harris v. Groth, 31 Wash. App. 876, 645 P.2d 1104 (Div. 1 1982)—6.13
Harris v. Robert C. Groth, M.D., Inc., P.S., 99 Wash. 2d 438, 663 P.2d 113 (1983)—105.01
Harris, In re, 98 Wash. 2d 276, 654 P.2d 109 (1982)—360.13, 360.13.01
Harrison Memorial Hosp. v. Gagnon, 110 Wash. App. 475, 40 P.3d 1221 (Div. 2 2002)—155.03
Hart v. King County, 104 Wash. 485, 177 P. 344 (1918)—100.09
Hartley v. State, 103 Wash. 2d 768, 698 P.2d 77 (1985)—15.01
Hartman v. Moore, 547 U.S. 250, 126 S. Ct. 1695, 164 L. Ed. 2d 441 (2006)—340.06
Harvey v. County of Snohomish, 157 Wash. 2d 33, 134 P.3d 216 (2006)—10.02
Hatter v. Dyer, 154 F. Supp. 3d 940 (C.D. Cal. 2015)—343.00
Haubry v. Snow, 106 Wash. App. 666, 31 P.3d 1186 (Div. 1 2001)—330.00, 330.52
Haugen v. Central Lutheran Church, 58 Wash. 2d 166, 361 P.2d 637 (1961)—120.05
Havens v. C & D Plastics, Inc., 124 Wash. 2d 158, 876 P.2d 435 (1994)—301.02, 301A.01
Havens v. C & D Plastics, Inc., 68 Wash. App. 159, 842 P.2d 975 (Div. 1 1992)—301A.01
Havlina v. Washington State Dept. of Transp., 142 Wash. App. 510, 178 P.3d 354 (Div. 2 2007)—330.34
Hawkins v. Marshall, 92 Wash. App. 38, 962 P.2d 834 (Div. 2 1998)—30.01.01, 30.07.01, 33.02
Hayes v. Trulock, 51 Wash. App. 795, 755 P.2d 830 (Div. 1 1988)—330.81, 330.82
Hayes v. Wieber Enterprises, Inc., 105 Wash. App. 611, 20 P.3d 496 (Div. 3 2001)—30.07.01
Haynes v. Moore, 14 Wash. App. 668, 545 P.2d 28 (Div. 2 1975)—12.02
Haysom v. Coleman Lantern Co., Inc., 89 Wash. 2d 474, 573 P.2d 785, 93 A.L.R.3d 86 (1978)—110.03
Haywood v. Drown, 556 U.S. 729, 129 S. Ct. 2108, 173 L. Ed. 2d 920 (2009)—340.00
Hearst Communications, Inc. v. Seattle Times Co., 154 Wash. 2d 493, 115 P.3d 262 (2005)—301.05
Heaton v. Imus, 93 Wash. 2d 249, 608 P.2d 631 (1980)—301A.02, 303.08

Heaverlo v. Keico Industries, Inc., 80 Wash. App. 724, 911 P.2d 406 (Div. 3 1996)—303.02
Heckman v. Sisters of Charity of House of Providence in Territory of Washington, 5 Wash. 2d 699, 106 P.2d 593 (1940)—120.05
Hegwine v. Longview Fibre Co., Inc., 162 Wash. 2d 340, 172 P.3d 688 (2007)—330.00, 330.01, 330.02, 330.03, 330.04, 330.31, 330.32
Hellan v. Supply Laundry Co., 94 Wash. 683, 163 P. 9 (1917)—15.04
Helling v. McKinney, 509 U.S. 25, 113 S. Ct. 2475, 125 L. Ed. 2d 22 (1993)—343.02, 343.06
Henderson v. Tyrrell, 80 Wash. App. 592, 910 P.2d 522 (Div. 3 1996)—5.01, 41.04
Heneghan v. Crown Crafts Infant Products, Inc., 868 F. Supp. 2d 1153 (W.D. Wash. 2012)—110.04
Henningsen v. Worldcom, Inc., 102 Wash. App. 828, 9 P.3d 948 (Div. 1 2000)—330.21, 330.22, 330.83
Henson v. City of Dundee, 682 F.2d 897 (11th Cir. 1982)—330.52
Herskovits v. Group Health Co-op. of Puget Sound, 99 Wash. 2d 609, 664 P.2d 474 (1983)—105.09
Hetzel v. Parks, 93 Wash. App. 929, 971 P.2d 115 (Div. 1 1999)—107.02, 107.04, 107.09, 107.10
Hewitt v. Miller, 11 Wash. App. 72, 521 P.2d 244 (Div. 1 1974)—13.04
Hiatt v. Department of Labor and Industries, 48 Wash. 2d 843, 297 P.2d 244 (1956)—155.07.01
Hiatt v. Walker Chevrolet Co., 120 Wash. 2d 57, 837 P.2d 618 (1992)—330.00
Hickman v. Desimone, 188 Wash. 499, 62 P.2d 1338 (1936)—30.06
Higbee v. Shorewood Osteopathic Hosp., 105 Wash. 2d 33, 711 P.2d 306 (1985)—31.02.01
Highline School Dist. No. 401, King County v. Port of Seattle, 87 Wash. 2d 6, 548 P.2d 1085 (1976)—380.03
Hill v. BCTI Income Fund-I, 144 Wash. 2d 172, 23 P.3d 440 (2001)—330.01, 330.41
Hill v. GTE Directories Sales Corp., 71 Wash. App. 132, 856 P.2d 746 (Div. 3 1993)—330.52
Hills v. King, 66 Wash. 2d 738, 404 P.2d 997 (1965)—30.07.01
Hiner v. Bridgestone/Firestone, Inc., 138 Wash. 2d 248, 978 P.2d 505 (1999)—110.00, 110.30.02, 110.31.01.01
Hines v. Data Line Systems, Inc., 114 Wash. 2d 127, 787 P.2d 8 (1990)—15.02
Hines v. Neuner, 42 Wash. 2d 116, 253 P.2d 945 (1953)—12.06
Hinkamp v. American Motors Corp., 735 F. Supp. 176 (E.D. N.C. 1989)—110.02.03
Hinkel v. Weyerhaeuser Co., 6 Wash. App. 548, 494 P.2d 1008 (Div. 2 1972)—12.06
Hinzman v. Palmanteer, 81 Wash. 2d 327, 501 P.2d 1228 (1972)—31.01.01, 31.06.01, 32.06.01, 34.02
Hipple v. McFadden, 161 Wash. App. 550, 255 P.3d 730 (Div. 2 2011)—107.00

Hizey v. Carpenter, 119 Wash. 2d 251, 830 P.2d 646 (1992)—107.04, 107.05, 107.06, 107.10
Hockley v. Hargitt, 82 Wash. 2d 337, 510 P.2d 1123 (1973)—310.00
Hoffer v. State, 113 Wash. 2d 148, 776 P.2d 963 (1989)—15.02
Hoffer v. State, 110 Wash. 2d 415, 755 P.2d 781 (1988)—160.01
Hoffstatter v. City of Seattle, 105 Wash. App. 596, 20 P.3d 1003 (Div. 1 2001)—135.01
Hogan v. Metropolitan Bldg. Co., 120 Wash. 82, 206 P. 959 (1922)—130.05
Hogland v. Klein, 49 Wash. 2d 216, 298 P.2d 1099 (1956)—22.01
Hoglund v. Raymark Industries, Inc., 50 Wash. App. 360, 749 P.2d 164 (Div. 1 1987)—15.04, 110.05
Holland v. Boeing Co., 90 Wash. 2d 384, 583 P.2d 621 (1978)—330.00, 330.33
Holland v. Niemi, 55 Wash. 2d 85, 345 P.2d 1106 (1959)—120.04
Hollingbery v. Dunn, 68 Wash. 2d 75, 411 P.2d 431 (1966)—50.01, 50.11, 50.11.01
Hollis v. Garwall, Inc., 137 Wash. 2d 683, 974 P.2d 836 (1999)—301.06
Holmes v. Raffo, 60 Wash. 2d 421, 374 P.2d 536 (1962)—30.16, 160.02, 165.05
Holmes v. Wallace, 84 Wash. App. 156, 926 P.2d 339 (Div. 2 1996)—70.05
Holt v. Nelson, 11 Wash. App. 230, 523 P.2d 211, 69 A.L.R.3d 1235 (Div. 1 1974)—105.04
Home v. North Kitsap School Dist., 92 Wash. App. 709, 965 P.2d 1112, 130 Ed. Law Rep. 297 (Div. 2 1998)—13.03, 120.05, 120.07, 120.08
Honegger v. Yoke's Washington Foods, Inc., 83 Wash. App. 293, 921 P.2d 1080 (Div. 3 1996)—11.01
Hooper v. Corliss, 146 Wash. 50, 261 P. 645 (1927)—70.03
Hopkins v. Cornerstone America, 545 F.3d 338 (5th Cir. 2008)—330.90
Hopkins v. Seattle Public School District No. 1, 195 Wash. App. 96, 380 P.3d 584, 335 Ed. Law Rep. 1156 (Div. 1 2016)—10.01
Horner v. Northern Pac. Beneficial Ass'n Hospitals, Inc., 62 Wash. 2d 351, 382 P.2d 518 (1963)—22.01
Hoseth v. Preston Mill Co., 49 Wash. 682, 96 P. 423 (1908)—33.02
Hoskins v. Reich, 142 Wash. App. 557, 174 P.3d 1250 (Div. 2 2008)—30.18
Hostetler v. Ward, 41 Wash. App. 343, 704 P.2d 1193 (Div. 2 1985)—380.00, 380.02
Hotchkiss v. CSK Auto Inc., 918 F. Supp. 2d 1108 (E.D. Wash. 2013)—330.24
Houck v. University of Washington, 60 Wash. App. 189, 803 P.2d 47, 64 Ed. Law Rep. 1236 (Div. 1 1991)—100.02, 100.08, 100.09
Hough v. Stockbridge, 152 Wash. App. 328, 216 P.3d 1077 (Div. 2 2009)—107.08
Housel v. James, 141 Wash. App. 748, 172 P.3d 712 (Div. 3 2007)—105.01, 105.04, 105.08

Houser v. City of Redmond, 91 Wash. 2d 36, 586 P.2d 482 (1978)—352.01
Houser & Haines Mfg. Co. v. McKay, 53 Wash. 337, 101 P. 894 (1909)—303.08
Housing Authority of City of Seattle v. Brown, 68 Wash. 2d 485, 413 P.2d 635 (1966)—151.01, 151.02
Houston, Tex., City of v. Hill, 482 U.S. 451, 107 S. Ct. 2502, 96 L. Ed. 2d 398 (1987)—340.06
Howell v. Spokane & Inland Empire Blood Bank, 114 Wash. 2d 42, 785 P.2d 815, 10 U.C.C. Rep. Serv. 2d 1186 (1990)—105.02.02, 105.04, 110.00
Howells v. North American Transp. & Trading Co., 24 Wash. 689, 64 P. 786 (1901)—30.09.01
Howlett By and Through Howlett v. Rose, 496 U.S. 356, 110 S. Ct. 2430, 110 L. Ed. 2d 332, 60 Ed. Law Rep. 358 (1990)—340.00, 340.06
Hubbard v. Spokane County, 146 Wash. 2d 699, 50 P.3d 602 (2002)—330.50
Hudson v. McMillian, 503 U.S. 1, 112 S. Ct. 995, 117 L. Ed. 2d 156 (1992)—343.08
Hudson v. Palmer, 468 U.S. 517, 104 S. Ct. 3194, 82 L. Ed. 2d 393 (1984)—343.00
Hudson v. City of Wenatchee, 94 Wash. App. 990, 974 P.2d 342 (Div. 3 1999)—352.02
Hue v. Farmboy Spray Co., Inc., 127 Wash. 2d 67, 896 P.2d 682 (1995)—15.02, 110.00
Hughes v. Chehalis School Dist. No. 302, 61 Wash. 2d 222, 377 P.2d 642 (1963)—130.04
Hume v. American Disposal Co., 124 Wash. 2d 656, 880 P.2d 988 (1994)—330.33
Humes v. Fritz Companies, Inc., 125 Wash. App. 477, 105 P.3d 1000 (Div. 1 2005)—12.06, 15.01, 15.01.01
Hunsley v. Giard, 87 Wash. 2d 424, 553 P.2d 1096 (1976)—120.07
Hunt v. Dental Dept., 865 F.2d 198 (9th Cir. 1989)—343.04
Hunter v. County of Sacramento, 652 F.3d 1225, 80 Fed. R. Serv. 3d 142 (9th Cir. 2011)—340.04, 340.06
Huston v. First Church of God, of Vancouver, 46 Wash. App. 740, 732 P.2d 173 (Div. 2 1987)—11.01, 120.06, 120.07
Hutchins v. 1001 Fourth Ave. Associates, 116 Wash. 2d 217, 802 P.2d 1360 (1991)—100.03, 120.02.01, 120.06.03, 120.08
Hutton v. Martin, 41 Wash. 2d 780, 252 P.2d 581 (1953)—24.03
Hvolboll v. Wolff Co., 187 Wash. App. 37, 347 P.3d 476 (Div. 3 2015)—13.00, 13.03, 120.07
Hyde v. Department of Labor and Industries, 46 Wash. 2d 31, 278 P.2d 390 (1955)—155.10

I

Idaho & W. Ry. Co. v. Coey, 73 Wash. 291, 131 P. 810 (1913)—150.10, 150.11

Ide v. Stoltenow, 47 Wash. 2d 847, 289 P.2d 1007 (1955)—30.07.01
Ikeda v. Curtis, 43 Wash. 2d 449, 261 P.2d 684 (1953)—6.08.01
Illinois v. Wardlow, 528 U.S. 119, 120 S. Ct. 673, 145 L. Ed. 2d 570 (2000)—342.10
Impoundment of Chevrolet Truck, WA License No.A00125A ex rel. Registered/Legal Owner, In re, 148 Wash. 2d 145, 60 P.3d 53 (2002)—107.08
Indian Trail Trunk Sewer, In re, 35 Wash. App. 840, 670 P.2d 675 (Div. 3 1983)—24.03
Indoor Billboard/Wash., Inc., v. Integra Telecom of Wash., Inc., 162 Wn.2d 59,170—310.01
Indoor Billboard/Washington, Inc. v. Integra Telecom of Washington, Inc., 162 Wash. 2d 59, 170 P.3d 10 (2007)—310.07
Industrial Indem. Co. of the Northwest, Inc. v. Kallevig, 114 Wash. 2d 907, 792 P.2d 520, 7 A.L.R.5th 1014 (1990)—320.00, 320.04, 320.06
Ingersoll v. DeBartolo, Inc., 123 Wash. 2d 649, 869 P.2d 1014 (1994)—120.06.02
Ingraham v. Wright, 430 U.S. 651, 97 S. Ct. 1401, 51 L. Ed. 2d 711 (1977)—343.00
Interchange Associates v. Interchange, Inc., 16 Wash. App. 359, 557 P.2d 357 (Div. 1 1976)—301.02
International Ultimate, Inc. v. St. Paul Fire & Marine Ins. Co., 122 Wash. App. 736, 87 P.3d 774 (Div. 1 2004)—320.02
Iron v. Sauve, 27 Wash. 2d 562, 179 P.2d 327 (1947)—50.13
Isakson v. WSI Corp., 771 F. Supp. 2d 1257 (W.D. Wash. 2011)—165.00
Island Air, Inc. v. LaBar, 18 Wash. App. 129, 566 P.2d 972 (Div. 1 1977)—352.05
ITT Rayonier, Inc. v. Puget Sound Freight Lines, 44 Wash. App. 368, 722 P.2d 1310, 2 U.C.C. Rep. Serv. 2d 148 (Div. 2 1986)—13.01, 13.03, 13.04
Iverson v. Pacific Am. Fisheries, 73 Wash. 2d 973, 442 P.2d 243 (1968)—6.14
Iwai v. State, Employment Security Department, 129 Wash. 2d 84, 915 P.2d 1089, 74 A.L.R.5th 711 (1996)—120.06.02, 120.07
Iwata v. Champine, 74 Wash. 2d 844, 447 P.2d 175 (1968)—70.03.03
Izett v. Walker, 67 Wash. 2d 903, 410 P.2d 802 (1966)—70.04

J

Jackowski v. Borchelt, 174 Wash. 2d 720, 278 P.3d 1100 (2012)—165.00
Jacks v. Blazer, 39 Wash. 2d 277, 235 P.2d 187 (1951)—300.02, 302.03
Jackson v. Indiana, 406 U.S. 715, 92 S. Ct. 1845, 32 L. Ed. 2d 435 (1972)—343.00, 360.21, 360.22
Jackson v. Metropolitan Edison Co., 419 U.S. 345, 95 S. Ct. 449, 42 L. Ed. 2d 477 (1974)—340.03
Jackson v. Peoples Federal Credit Union, 25 Wash. App. 81, 604 P.2d 1025 (Div. 2 1979)—14.03, 14.03.02
Jackson v. Standard Oil Co. of California, 8 Wash. App. 83, 505 P.2d 139 (Div. 2 1972)—12.09

Jacobsen v. City of Seattle, 98 Wash. 2d 668, 658 P.2d 653 (1983)—342.04
Jacob's Meadow Owners Ass'n v. Plateau 44 II, LLC, 139 Wash. App. 743, 162 P.3d 1153 (Div. 1 2007)—107.08, 303.01
Jacobson v. Department of Labor & Industries, 37 Wash. 2d 444, 224 P.2d 338 (1950)—155.20
Jacobson, In re, 120 Wash. App. 770, 86 P.3d 1202 (Div. 1 2004)—365.00
J.A.F., In re Dependency of, 168 Wash. App. 653, 278 P.3d 673 (Div. 1 2012)—165.05
Jahn v. Hyundai Motor Co., 773 N.W.2d 550 (Iowa 2009)—110.02.03
James v. Edwards, 68 Wash. 2d 194, 412 P.2d 123 (1966)—71.04
James v. Niebuhr, 63 Wash. 2d 800, 389 P.2d 287 (1964)—70.04
Janicki Logging & Const. Co., Inc. v. Schwabe, Williamson & Wyatt, P.C., 109 Wash. App. 655, 37 P.3d 309 (Div. 1 2001)—107.00
Janson v. North Valley Hosp., 93 Wash. App. 892, 971 P.2d 67 (Div. 3 1999)—330.81.01, 330.81.02
Jaramillo v. Morris, 50 Wash. App. 822, 750 P.2d 1301 (Div. 3 1988)—105.02.01
Jarr v. Seeco Const. Co., 35 Wash. App. 324, 666 P.2d 392 (Div. 1 1983)—120.00, 120.05, 120.07
Jenkins v. Snohomish County Public Utility Dist. No. 1, 105 Wash. 2d 99, 713 P.2d 79 (1986)—6.05, 14.01
Jensen v. Culbert, 134 Wash. 599, 236 P. 101 (1925)—31.02.01
Jerdal v. Sinclair, 54 Wash. 2d 565, 342 P.2d 585 (1959)—70.03, 72.05
Jet Boats, Inc. v. Puget Sound Nat. Bank, 44 Wash. App. 32, 721 P.2d 18 (Div. 2 1986)—303.02
Jett v. Dallas Independent School Dist., 491 U.S. 701, 109 S. Ct. 2702, 105 L. Ed. 2d 598, 54 Ed. Law Rep. 30 (1989)—341.01
Jewels v. City of Bellingham, 183 Wash. 2d 388, 353 P.3d 204 (2015)—120.07
J.N., In re, 123 Wash. App. 564, 95 P.3d 414 (Div. 2 2004)—301.10
Johnson v. Busby, 953 F.2d 349 (8th Cir. 1991)—343.04
Johnson v. Chevron U.S.A., Inc., 159 Wash. App. 18, 244 P.3d 438 (Div. 1 2010)—330.32, 330.33
Johnson v. Cook, 24 Wash. 474, 64 P. 729 (1901)—303.01
Johnson v. Duffy, 588 F.2d 740 (9th Cir. 1978)—340.02, 340.04
Johnson v. Dye, 131 Wash. 637, 230 P. 625 (1924)—30.01.04
Johnson v. Howard, 45 Wash. 2d 433, 275 P.2d 736 (1954)—20.01
Johnson v. Jones, 515 U.S. 304, 115 S. Ct. 2151, 132 L. Ed. 2d 238, 32 Fed. R. Serv. 3d 1 (1995)—340.01
Johnson v. NEW, Inc., 89 Wash. App. 309, 948 P.2d 877 (Div. 3 1997)—13.04
Johnson v. Northern Pac. Ry. Co., 66 Wash. 2d 614, 404 P.2d 444 (1965)—70.09
Johnson v. Recreational Equipment, Inc., 159 Wash. App. 939, 247 P.3d 18 (Div. 1 2011)—110.04, 110.31.01.01, 110.31.01.02

Johnson v. Schafer, 110 Wash. 2d 546, 756 P.2d 134 (1988)—120.02
Johnson v. State, 77 Wash. App. 934, 894 P.2d 1366, 100 Ed. Law Rep. 351 (Div. 1 1995)—15.05
Johnson v. Washington Route, 121 Wash. 608, 209 P. 1100 (1922)—12.06
Johnson v. Weyerhaeuser Co., 134 Wash. 2d 795, 953 P.2d 800 (1998)—330.81
Johnson v. Whitman, 1 Wash. App. 540, 463 P.2d 207 (Div. 1 1969)—301.02
Johnston v. Nichols, 83 Wash. 394, 145 P. 417 (1915)—130.04
Jones v. Halvorson-Berg, 69 Wash. App. 117, 847 P.2d 945 (Div. 3 1993)—50.01
Jones v. Robert E. Bayley Const. Co., Inc., 36 Wash. App. 357, 674 P.2d 679 (Div. 1 1984)—12.09, 15.01, 15.04
Jones v. Sisters of Providence in Washington, Inc., 140 Wash. 2d 112, 994 P.2d 838 (2000)—6.17.01
Jones, Estate of v. State, 107 Wash. App. 510, 15 P.3d 180 (Div. 1 2000)—15.01
Jones, In re Estate of, 170 Wash. App. 594, 287 P.3d 610 (Div. 3 2012)—165.04, 301.11
Jones Associates, Inc. v. Eastside Properties, Inc., 41 Wash. App. 462, 704 P.2d 681 (Div. 1 1985)—302.08
Jonson v. Chicago, M., St. P. and P. R. Co., 24 Wash. App. 377, 601 P.2d 951 (Div. 2 1979)—15.01, 310.07
Joyce v. State, Dept. of Corrections, 155 Wash. 2d 306, 119 P.3d 825 (2005)—60.03
Jung v. York, 75 Wash. 2d 195, 449 P.2d 409 (1969)—70.03, 70.03.01

K

K-2 Ski Co. v. Head Ski Co., Inc., 506 F.2d 471, 19 Fed. R. Serv. 2d 1418 (9th Cir. 1974)—351.02
Kadmiri v. Claassen, 103 Wash. App. 146, 10 P.3d 1076 (Div. 3 2000)—30.07.01
Kaech v. Lewis County Public Utility Dist. No. 1, 106 Wash. App. 260, 23 P.3d 529, 91 A.L.R.5th 727 (Div. 2 2001)—30.10, 380.00
Kahin v. City of Seattle, 64 Wash. 2d 872, 395 P.2d 79 (1964)—151.03
Kaho'ohanohano v. Dep't of Human Servs., 117 Haw. 262, 178 P.3d 538 (2008)—343.00
Kahuna Land Co. v. Spokane County, 94 Wash. App. 836, 974 P.2d 1249 (Div. 3 1999)—150.04
Kaiser v. Suburban Transp. System, 65 Wn.2d 461, 398 P.2d 14, 401 P.2d 350 (1965)—100.01
Kaiser Aluminum & Chemical Corp. v. Department of Labor and Industries, 43 Wash. 2d 584, 262 P.2d 536 (1953)—155.03
Kaiser Steel Corp. v. Frank Coluccio Const. Co., 785 F.2d 656 (9th Cir. 1986)—301A.01
Kalinowski v. Young Women's Christian Ass'n, 17 Wash. 2d 380, 135 P.2d 852 (1943)—120.05

Kallos v. Department of Labor and Industries, 46 Wash. 2d 26, 278 P.2d 393 (1955)—155.25
Kane v. Borthwick, 50 Wash. 8, 96 P. 516 (1908)—302.02
Kane v. Nakamoto, 113 Wash. 476, 194 P. 381 (1920)—30.06, 30.14
Kansas v. Crane, 534 U.S. 407, 122 S. Ct. 867, 151 L. Ed. 2d 856 (2002)—365.10
Kansas v. Hendricks, 521 U.S. 346, 117 S. Ct. 2072, 138 L. Ed. 2d 501 (1997)—365.10
Karan, In re Guardianship of, 110 Wash. App. 76, 38 P.3d 396 (Div. 3 2002)—107.02
Kastanis v. Educ. Employees Credit Union, 122 Wn.2d 483, 859 P.2d 26, 865 P.2d 507 (1993)—330.01
Katz v. U.S., 389 U.S. 347, 88 S. Ct. 507, 19 L. Ed. 2d 576 (1967)—342.04
Kaufmann v. Woodard, 24 Wash. 2d 264, 163 P.2d 606 (1945)—301.09
Keck By and Through Cabe, Estate of v. Blair, 71 Wash. App. 105, 856 P.2d 740 (Div. 1 1993)—15.04, 15.05
Keegan v. Grant County Public Utility Dist. No. 2, 34 Wash. App. 274, 661 P.2d 146 (Div. 3 1983)—12.09
Keene Valley Ventures, Inc. v. City of Richland, 174 Wash. App. 219, 298 P.3d 121 (Div. 3 2013)—150.04
Keesling v. City of Seattle, 52 Wash. 2d 247, 324 P.2d 806 (1958)—150.06.01, 150.06.02
Keiffer v. King County, 89 Wash. 2d 369, 572 P.2d 408 (1977)—151.01
Keller v. City of Spokane, 146 Wash. 2d 237, 44 P.3d 845 (2002)—140.01
Kellerher v. Porter, 29 Wash. 2d 650, 189 P.2d 223 (1948)—34.02
Kelley v. Great Northern Ry. Co., 59 Wash. 2d 894, 371 P.2d 528 (1962)—6.03, 12.09
Kelley v. Howard S. Wright Const. Co., 90 Wash. 2d 323, 582 P.2d 500 (1978)—50.11
Kelly v. Foster, 62 Wash. App. 150, 813 P.2d 598 (Div. 1 1991)—107.00, 107.08
Kelly v. Navy Yard Route, 77 Wash. 148, 137 P. 444 (1913)—100.03
Kelly By and Through Kelly, Estate of v. Falin, 127 Wash. 2d 31, 896 P.2d 1245 (1995)—60.03, 370.01, 370.02
Kelsey v. Pollock, 59 Wash. 2d 796, 370 P.2d 598 (1962)—70.06
Keltner v. Ford Motor Co., 748 F.2d 1265, 16 Fed. R. Evid. Serv. 1260 (8th Cir. 1984)—110.02.03
Kemp v. Leonard, 70 Wash. 2d 643, 424 P.2d 660 (1967)—1.03
Kennard v. Kaelin, 58 Wash. 2d 524, 364 P.2d 446 (1961)—30.08.01
Kennett v. Yates, 41 Wash. 2d 558, 250 P.2d 962 (1952)—15.05
Kentucky v. King, 563 U.S. 452, 131 S. Ct. 1849, 179 L. Ed. 2d 865 (2011)—342.07
Keogan v. Holy Family Hospital, 95 Wash. 2d 306, 622 P.2d 1246 (1980)—105.01
Kerlik v. Jerke, 56 Wash. 2d 575, 354 P.2d 702 (1960)—70.02.06

Kerr v. Cochran, 65 Wash. 2d 211, 396 P.2d 642 (1964)—340.01
Kessinger v. Anderson, 31 Wash. 2d 157, 196 P.2d 289 (1948)—302.07
Ketchum v. Albertson Bulb Gardens, 142 Wash. 134, 252 P. 523 (1927)—303.01
Ketchum v. Overlake Hosp. Medical Center, 60 Wash. App. 406, 804 P.2d 1283 (Div. 1 1991)—105.01
Kewanee Oil Co. v. Bicron Corp., 416 U.S. 470, 94 S. Ct. 1879, 40 L. Ed. 2d 315 (1974)—351.02
Key v. Reiswig, 55 Wash. 2d 512, 348 P.2d 410 (1960)—70.02.01
Keystone Land & Development Co. v. Xerox Corp., 152 Wash. 2d 171, 94 P.3d 945 (2004)—302.11
Kidwell v. School Dist. No. 300, Whitman County, 53 Wash. 2d 672, 335 P.2d 805 (1959)—120.05
Kiehlhoefer v. Washington Water Power Co., 49 Wash. 646, 96 P. 220 (1908)—6.08.01
Kilthau v. Covelli, 17 Wash. App. 460, 563 P.2d 1305 (Div. 3 1977)—301.02
Kim v. Budget Rent A Car Systems, Inc., 143 Wash. 2d 190, 15 P.3d 1283 (2001)—120.06.03
Kim v. Dean, 133 Wash. App. 338, 135 P.3d 978 (Div. 1 2006)—301A.01
Kimball v. Otis Elevator Co., 89 Wash. App. 169, 947 P.2d 1275 (Div. 3 1997)—100.02
Kincaid v. City of Seattle, 74 Wash. 617, 134 P. 504 (1913)—151.02, 151.06
King v. Cann, 184 Wash. 554, 52 P.2d 900 (1935)—72.05
King v. Riveland, 125 Wash. 2d 500, 886 P.2d 160 (1994)—50.01, 50.02.01, 50.03, 301.04, 301A.01
King County v. Crawford & Conover, 92 Wash. 195, 158 P. 733 (1916)—150.05, 150.09
King County ex rel. Sowers v. Chisman, 33 Wash. App. 809, 658 P.2d 1256 (Div. 1 1983)—380.00
Kingsley v. Hendrickson, 135 S. Ct. 2466, 192 L. Ed. 2d 416 (2015)—343.00, 343.08
Kirby v. City of Tacoma, 124 Wash. App. 454, 98 P.3d 827 (Div. 2 2004)—14.03, 14.03.01, 330.01.02
Kirk v. Moe, 114 Wash. 2d 550, 789 P.2d 84 (1990)—302.05
Kirk v. Washington State University, 109 Wash. 2d 448, 746 P.2d 285, 43 Ed. Law Rep. 417 (1987)—13.00, 13.02, 13.03, 13.04, 30.05
Kirkland v. Emhart Glass S.A., 805 F. Supp. 2d 1072 (W.D. Wash. 2011)—110.03
Kitsap County v. Kev, Inc., 106 Wash. 2d 135, 720 P.2d 818 (1986)—380.00, 380.01, 380.04
Kitsap County v. Kitsap Rifle and Revolver Club, 184 Wash. App. 252, 337 P.3d 328 (Div. 2 2014)—380.00, 380.02, 380.03
Kitt v. Yakima County, 93 Wash. 2d 670, 611 P.2d 1234 (1980)—140.01
Klein v. R.D. Werner Co., Inc., 98 Wash. 2d 316, 654 P.2d 94 (1982)—110.10

Klem v. Washington Mut. Bank, 176 Wash. 2d 771, 295 P.3d 1179 (2013)—310.00, 310.01, 310.08
Klinke v. Famous Recipe Fried Chicken, Inc., 94 Wash. 2d 255, 616 P.2d 644 (1980)—301A.01
Kloepfel v. Bokor, 149 Wash. 2d 192, 66 P.3d 630 (2003)—14.03, 14.03.01, 14.03.04
Kloss v. Honeywell, Inc., 77 Wash. App. 294, 890 P.2d 480 (Div. 1 1995)—330.83
Kness v. Truck Trailer Equipment Co., 81 Wash. 2d 251, 501 P.2d 285 (1972)—60.03
Knights of Ku Klux Klan, Realm of Louisiana v. East Baton Rouge Parish School Bd., 735 F.2d 895 (5th Cir. 1984)—340.00, 340.01
Knowles v. Department of Labor and Industries, 28 Wash. 2d 970, 184 P.2d 591 (1947)—155.13
Knowles, In re Estate of, 135 Wash. App. 351, 143 P.3d 864 (Div. 2 2006)—107.04
Koch v. Mutual of Enumclaw Ins. Co., 108 Wash. App. 500, 31 P.3d 698 (Div. 1 2001)—352.01
Kofmehl v. Baseline Lake, LLC, 177 Wash. 2d 584, 305 P.3d 230 (2013)—303.08
Kohfeld v. United Pacific Ins. Co., 85 Wash. App. 34, 931 P.2d 911 (Div. 1 1997)—2.10
Kohn v. Georgia-Pacific Corp., 69 Wash. App. 709, 850 P.2d 517 (Div. 1 1993)—303.03
Koker v. Armstrong Cork, Inc., 60 Wash. App. 466, 804 P.2d 659 (Div. 1 1991)—15.05
Korslund v. DynCorp Tri-Cities Services, Inc., 156 Wash. 2d 168, 125 P.3d 119 (2005)—301A.01, 330.51
Kottler v. State, 136 Wash. 2d 437, 963 P.2d 834 (1998)—41.04, 50.20
Kreger v. Hall, 70 Wash. 2d 1002, 425 P.2d 638 (1967)—302.04
Kresoya v. Department of Labor and Industries, 40 Wash. 2d 40, 240 P.2d 257 (1952)—155.11.01
Krieger v. McLaughlin, 50 Wash. 2d 461, 313 P.2d 361 (1957)—5.01
Kries v. WA-SPOK Primary Care, LLC, 190 Wash. App. 98, 362 P.3d 974 (Div. 3 2015)—330.00, 330.04, 330.32, 330.37
Krogh v. Pemble, 50 Wash. 2d 250, 310 P.2d 1069 (1957)—70.03.05
Kubista v. Romaine, 87 Wash. 2d 62, 549 P.2d 491 (1976)—33.01
Kuehn v. Renton School Dist. No. 403, 103 Wash. 2d 594, 694 P.2d 1078, 22 Ed. Law Rep. 1297 (1985)—342.04
Kuest v. Regent Assisted Living, Inc., 111 Wash. App. 36, 43 P.3d 23 (Div. 1 2002)—330.01
Kuhnle v. Department of Labor and Industries, 12 Wash. 2d 191, 120 P.2d 1003 (1942)—155.07, 155.07.01
Kumar v. Gate Gourmet Inc., 180 Wash. 2d 481, 325 P.3d 193 (2014)—330.00, 330.02, 330.40, 330.41, 330.42
Kutsugeras v. AVCO Corp., 973 F.2d 1341 (7th Cir. 1992)—110.02.03

L

LaBelle, In re, 107 Wash. 2d 196, 728 P.2d 138 (1986)—360.02, 360.06, 360.12
Lacey v. Maricopa County, 649 F.3d 1118 (9th Cir. 2011)—340.06
LaConner, Town of v. American Const. Co., Inc., 21 Wash. App. 336, 585 P.2d 162 (Div. 1 1978)—301.09
Lahmann v. Sisters of St. Francis of Philadelphia, 55 Wash. App. 716, 780 P.2d 868 (Div. 2 1989)—45.21
Lakes v. von der Mehden, 117 Wash. App. 212, 70 P.3d 154 (Div. 3 2003)—30.07.01
Lakeside-Scott v. Multnomah County, 556 F.3d 797 (9th Cir. 2009)—340.04, 340.06
Lakey v. Puget Sound Energy, Inc., 176 Wash. 2d 909, 296 P.3d 860 (2013)—380.03
LaLonde v. County of Riverside, 204 F.3d 947 (9th Cir. 2000)—342.07
Lambert v. Smith, 54 Wash. 2d 348, 340 P.2d 774 (1959)—12.01.01
Lambert v. State Farm Mut. Auto. Ins. Co., 2 Wash. App. 136, 467 P.2d 214 (Div. 1 1970)—300.03
Lamborn v. Phillips Pac. Chemical Co., 89 Wash. 2d 701, 575 P.2d 215 (1978)—1.06
Lamon v. McDonnell Douglas Corp., 19 Wash. App. 515, 576 P.2d 426 (Div. 1 1978)—110.03
LaMontagne, Estate of v. Bristol-Myers Squibb, 127 Wash. App. 335, 111 P.3d 857 (Div. 1 2005)—110.02.01
La Moreaux v. Fosket, 45 Wash. 2d 249, 273 P.2d 795 (1954)—10.02
Lange v. State, 86 Wash. 2d 585, 547 P.2d 282 (1976)—150.05, 151.15
Lanman v. Hinson, 529 F.3d 673 (6th Cir. 2008)—343.00
Lappin v. Lucurell, 13 Wash. App. 277, 534 P.2d 1038, 94 A.L.R.3d 594 (Div. 1 1975)—24.03
Lapping, Estate of v. Group Health Co-op. of Puget Sound, 77 Wash. App. 612, 892 P.2d 1116 (Div. 2 1995)—105.07
Larez v. City of Los Angeles, 946 F.2d 630, 34 Fed. R. Evid. Serv. 1103 (9th Cir. 1991)—341.01, 341.02
Larsen v. General Motors Corp., 391 F.2d 495 (8th Cir. 1968)—110.02.02
Larsen v. Walton Plywood Co., 65 Wn.2d 1, 390 P.2d 677 (1964)—303.04
Larson v. Eldridge, 153 Wash. 23, 279 P. 120 (1929)—130.05
Larson v. Pischell, 13 Wash. App. 576, 535 P.2d 833 (Div. 1 1975)—12.01
Larson, Matter of Estate of, 103 Wash. 2d 517, 694 P.2d 1051 (1985)—107.09
Lascheid v. City of Kennewick, 137 Wash. App. 633, 154 P.3d 307 (Div. 3 2007)—13.03
Laudermilk v. Carpenter, 78 Wn.2d 92, 457 P.2d 1004 (1969)—120.02, 120.04
Lauritzen v. Lauritzen, 74 Wash. App. 432, 874 P.2d 861 (Div. 2 1994)—72.01, 72.02, 100.03

Lavigne v. Chase, Haskell, Hayes & Kalamon, P.S., 112 Wash. App. 677, 50 P.3d 306 (Div. 3 2002)—107.07
Lawyers Title Ins. Corp. v. Baik, 147 Wash. 2d 536, 55 P.3d 619 (2002)—165.00, 165.01
Leaverton v. Cascade Surgical Partners, P.L.L.C., 160 Wash. App. 512, 248 P.3d 136 (Div. 3 2011)—105.01, 105.02
Leavy, Taber, Schultz and Bergdahl v. Metropolitan Life Ins. Co., 20 Wash. App. 503, 581 P.2d 167 (Div. 3 1978)—16.01
Ledcor Industries (USA), Inc. v. Mutual of Enumclaw Ins. Co., 150 Wash. App. 1, 206 P.3d 1255 (Div. 1 2009)—320.00
Lee v. Bergesen, 58 Wash. 2d 462, 364 P.2d 18 (1961)—303.01, 303.07
Lee ex rel. Lee, Estate of v. City of Spokane, 101 Wash. App. 158, 2 P.3d 979 (Div. 3 2000)—342.03
Leeper v. Department of Labor and Industries, 123 Wash. 2d 803, 872 P.2d 507 (1994)—155.07
Lehrer v. State, Dept. of Social and Health Services, 101 Wash. App. 509, 5 P.3d 722 (Div. 3 2000)—300.01
Leingang v. Pierce County Medical Bureau, Inc., 131 Wash. 2d 133, 930 P.2d 288 (1997)—310.08, 320.00, 320.06, 352.01
Lenci v. City of Seattle, 63 Wash. 2d 664, 388 P.2d 926 (1964)—151.01
Lenhardt v. Ford Motor Co., 102 Wash. 2d 208, 683 P.2d 1097, 47 A.L.R.4th 609 (1984)—110.02
Leonard v. Pay'n Save Drug Stores, Inc., 75 Wash. App. 445, 880 P.2d 61 (Div. 2 1994)—120.07
Leonard v. Washington Emp., Inc., 77 Wash. 2d 271, 461 P.2d 538 (1969)—301.08, 302.05
Leon G., In re, 204 Ariz. 15, 59 P.3d 779 (2002)—365.10
Leslie v. Fidelity Nat. Title Ins. Co., 598 F. Supp. 2d 1176 (W.D. Wash. 2009)—320.00
Lewis v. Doll, 53 Wash. App. 203, 765 P.2d 1341 (Div. 3 1989)—330.01
Lewis v. ITT Continental Baking Co., 93 Wash. 2d 1, 603 P.2d 1262 (1979)—155.09, 155.11.01
Lewis v. Scott, 54 Wash. 2d 851, 341 P.2d 488 (1959)—15.01
Lewis v. City of Seattle, 5 Wash. 741, 32 P. 794 (1893)—150.00, 150.07, 150.07.01
Leyendecker v. Cousins, 53 Wash. App. 769, 770 P.2d 675 (Div. 2 1989)—13.02, 13.03, 13.04
Lian v. Stalick, 115 Wash. App. 590, 62 P.3d 933 (Div. 3 2003)—130.06
Lian v. Stalick, 106 Wash. App. 811, 25 P.3d 467 (Div. 3 2001)—130.03, 130.06
Liberal v. Estrada, 632 F.3d 1064 (9th Cir. 2011)—342.06
Liberty Furniture, Inc. v. Sonitrol of Spokane, Inc., 53 Wash. App. 879, 770 P.2d 1086 (Div. 3 1989)—13.04
Lidel v. Kelly, 52 Wash. 2d 238, 324 P.2d 817 (1958)—70.04
Liebergesell v. Evans, 93 Wash. 2d 881, 613 P.2d 1170 (1980)—165.03
Lien v. Barnett, 58 Wash. App. 680, 794 P.2d 865 (Div. 1 1990)—32.04
Lieske v. Natsuhara, 165 Wash. 270, 5 P.2d 307 (1931)—30.06

Lightfoot v. MacDonald, 86 Wash. 2d 331, 544 P.2d 88 (1976)—310.00
Lincoln v. Farnkoff, 26 Wash. App. 717, 613 P.2d 1212 (Div. 3 1980)—130.06
Lindquist v. Dengel, 92 Wash. 2d 257, 595 P.2d 934 (1979)—30.07.01
Little v. King County, 159 Wash. 326, 293 P. 438 (1930)—150.07
Little v. PPG Industries, Inc., 92 Wash. 2d 118, 594 P.2d 911 (1979)—110.03
Littlefair v. Schulze, 169 Wash. App. 659, 278 P.3d 218 (Div. 2 2012)—380.01.01, 380.04
Livingston v. City of Everett, 50 Wash. App. 655, 751 P.2d 1199 (Div. 1 1988)—14.01
LK Operating, LLC v. Collection Group, LLC, 181 Wash. 2d 117, 330 P.3d 190 (2014)—107.08
Lockhart v. Besel, 71 Wash. 2d 112, 426 P.2d 605 (1967)—31.06.01
Lockhart v. Greive, 66 Wash. App. 735, 834 P.2d 64 (Div. 1 1992)—107.01
Lockwood v. AC & S, Inc., 109 Wash. 2d 235, 744 P.2d 605 (1987)—110.03.01
Lodis v. Corbis Holdings, Inc., 192 Wash. App. 30, 366 P.3d 1246 (Div. 1 2015)—330.00, 330.05, 330.81.01, 330.81.02
Lodis v. Corbis Holdings, Inc., 172 Wash. App. 835, 292 P.3d 779 (Div. 1 2013)—330.05
Lofgren v. Western Washington Corp. of Seventh Day Adventists, 65 Wash. 2d 144, 396 P.2d 139 (1964)—30.06, 32.06.01, 34.04
Logan v. City of Pullman, 392 F. Supp. 2d 1246 (E.D. Wash. 2005)—342.03
Lokan & Associates, Inc. v. American Beef Processing, LLC, 177 Wash. App. 490, 311 P.3d 1285 (Div. 1 2013)—301.02, 301.04
Long v. Dugan, 57 Wash. App. 309, 788 P.2d 1 (Div. 2 1990)—31.03.02
Long v. T-H Trucking Co., 4 Wash. App. 922, 486 P.2d 300 (Div. 2 1971)—303.04
Lonsdale v. Chesterfield, 99 Wash. 2d 353, 662 P.2d 385 (1983)—302.08, 302.11
Lopez v. Smith, 203 F.3d 1122, 46 Fed. R. Serv. 3d 494 (9th Cir. 2000)—343.04
Lords v. Northern Automotive Corp., 75 Wash. App. 589, 881 P.2d 256 (Div. 3 1994)—330.82
Los Angeles, City of v. Heller, 475 U.S. 796, 106 S. Ct. 1571, 89 L. Ed. 2d 806 (1986)—340.06
Losli v. Foster, 37 Wash. 2d 220, 222 P.2d 824 (1950)—303.08
Lubliner v. Ruge, 21 Wash. 2d 881, 153 P.2d 694 (1944)—12.01
Luchtel v. Hagemann, 623 F.3d 975 (9th Cir. 2010)—342.03
Lugar v. Edmondson Oil Co., Inc., 457 U.S. 922, 102 S. Ct. 2744, 73 L. Ed. 2d 482 (1982)—340.00
Luna v. Seattle Times Co., 186 Wash. 618, 59 P.2d 753, 105 A.L.R. 932 (1936)—24.03
Lund v. Caple, 100 Wash. 2d 739, 675 P.2d 226 (1984)—14.03, 32.04

Lundberg v. All-Pure Chemical Co., 55 Wash. App. 181, 777 P.2d 15 (Div. 2 1989)—110.00, 110.02.04, 110.03.01, 110.10
Lundgren v. Whitney's, Inc., 94 Wash. 2d 91, 614 P.2d 1272 (1980)—32.04
Lunt v. Mount Spokane Skiing Corp., 62 Wash. App. 353, 814 P.2d 1189 (Div. 3 1991)—110.03
Lutheran Day Care v. Snohomish County, 119 Wash. 2d 91, 829 P.2d 746 (1992)—340.02, 340.06
Luttrell v. Novartis Pharmaceuticals Corp., 894 F. Supp. 2d 1324 (E.D. Wash. 2012)—110.03
L.W. v. Grubbs, 92 F.3d 894 (9th Cir. 1996)—340.02
Lybbert v. Grant County, State of Wash., 141 Wash. 2d 29, 1 P.3d 1124 (2000)—302.05, 302.06
Lynch v. Cannatella, 810 F.2d 1363 (5th Cir. 1987)—340.01
Lynott v. National Union Fire Ins. Co. of Pittsburgh, Pa., 123 Wash. 2d 678, 871 P.2d 146 (1994)—5.01, 301.05
Lyons v. Redding Const. Co., 83 Wash. 2d 86, 515 P.2d 821 (1973)—13.01

M

MacDonald v. Hayner, 43 Wash. App. 81, 715 P.2d 519 (Div. 1 1986)—301.07
Machek v. City of Seattle, 118 Wash. 42, 203 P. 25 (1921)—31.03.02, 31.06.01
Machen, Inc. v. Aircraft Design, Inc., 65 Wash. App. 319, 828 P.2d 73 (Div. 3 1992)—351.02
Macias v. Saberhagen Holdings, Inc., 175 Wash. 2d 402, 282 P.3d 1069 (2012)—110.03, 110.04
Mackay v. Acorn Custom Cabinetry, Inc., 127 Wash. 2d 302, 898 P.2d 284 (1995)—15.02, 330.01, 330.01.01, 330.32
Madill v. Los Angeles Seattle Motor Exp., Inc., 64 Wash. 2d 548, 392 P.2d 821 (1964)—12.01, 16.04.01
Mading v. McPhaden, 50 Wash. 2d 48, 308 P.2d 963 (1957)—50.13
Magney v. Lincoln Mut. Sav. Bank, 34 Wash. App. 45, 659 P.2d 537 (Div. 3 1983)—310.08
Mailloux v. State Farm Mut. Auto. Ins. Co., 76 Wash. App. 507, 887 P.2d 449 (Div. 2 1995)—41.04
Malley v. Briggs, 475 U.S. 335, 106 S. Ct. 1092, 89 L. Ed. 2d 271 (1986)—340.06
Mall Tool Co. v. Far West Equipment Co., 45 Wash. 2d 158, 273 P.2d 652 (1954)—303.02
Malotte v. Gorton, 75 Wash. 2d 306, 450 P.2d 820 (1969)—24.03
Maltman v. Sauer, 84 Wash. 2d 975, 530 P.2d 254 (1975)—15.05
Manuel v. City of Joliet, Ill., 137 S. Ct. 911, 197 L. Ed. 2d 312 (2017)—342.03
Marin v. King County, 194 Wash. App. 795, 378 P.3d 203 (Div. 1 2016)—330.01.02

Marks v. Alaska S.S. Co., 71 Wash. 167, 127 P. 1101 (1912)—100.04
Marks, In re Estate of, 91 Wash. App. 325, 957 P.2d 235 (Div. 3 1998)—107.04
Marquis v. City of Spokane, 130 Wash. 2d 97, 922 P.2d 43 (1996)—330.00
Marshall v. Western Air Lines, Inc., 62 Wash. App. 251, 813 P.2d 1269 (Div. 1 1991)—22.01
Marthaller v. King County Hosp. Dist. No. 2, 94 Wash. App. 911, 973 P.2d 1098 (Div. 1 1999)—105.02.01
Martin v. Abbott Laboratories, 102 Wash. 2d 581, 689 P.2d 368 (1984)—50.20
Martin v. Foss Launch & Tug Co., 59 Wash. 2d 302, 367 P.2d 981 (1962)—33.02
Martin v. Gonzaga University, 191 Wash. 2d 712, 425 P.3d 837, 358 Ed. Law Rep. 586 (2018)—330.51
Martin v. Gonzaga University, 200 Wash. App. 332, 402 P.3d 294, 347 Ed. Law Rep. 628 (Div. 3 2017)—330.51
Martin v. Goodyear Tire & Rubber Co., 114 Wash. App. 823, 61 P.3d 1196 (Div. 1 2003)—110.08
Martin v. Hunter's Lessee, 14 U.S. 304, 4 L. Ed. 97, 1816 WL 1721 (1816)—340.00
Martin v. Kidwiler, 71 Wash. 2d 47, 426 P.2d 489 (1967)—12.03, 13.03, 13.04
Martin v. Schoonover, 13 Wash. App. 48, 533 P.2d 438 (Div. 1 1975)—1.02
Martin v. Port of Seattle, 64 Wash. 2d 309, 391 P.2d 540 (1964)—151.01
Martinez v. State of Cal., 444 U.S. 277, 100 S. Ct. 553, 62 L. Ed. 2d 481 (1980)—340.06
Martini v. Boeing Co., 137 Wash. 2d 357, 971 P.2d 45 (1999)—330.00, 330.33, 330.52, 330.81
Martini v. Post, 178 Wash. App. 153, 313 P.3d 473 (Div. 2 2013)—130.06
Martini ex rel. Dussault v. State, 121 Wash. App. 150, 89 P.3d 250 (Div. 2 2004)—70.04
Maryland v. Buie, 494 U.S. 325, 110 S. Ct. 1093, 108 L. Ed. 2d 276 (1990)—342.05
Maryland v. Pringle, 540 U.S. 366, 124 S. Ct. 795, 157 L. Ed. 2d 769 (2003)—342.09
Mason v. Bitton, 85 Wash. 2d 321, 534 P.2d 1360 (1975)—71.01
Mason v. Mortgage America, Inc., 114 Wash. 2d 842, 792 P.2d 142 (1990)—310.06
Massey v. Tube Art Display, Inc., 15 Wash. App. 782, 551 P.2d 1387 (Div. 1 1976)—50.01, 50.11.01
Masunaga v. Gapasin, 57 Wash. App. 624, 790 P.2d 171 (Div. 1 1990)—31.03.02, 31.06.01
Mathis v. Ammons, 84 Wash. App. 411, 928 P.2d 431 (Div. 2 1996)—10.01, 60.03
Mathis v. H.S. Kress Co., 38 Wash. 2d 845, 232 P.2d 921 (1951)—120.06.02

Mathis v. Swanson, 68 Wash. 2d 424, 413 P.2d 662 (1966)—120.04
Matson v. Emory, 36 Wash. App. 681, 676 P.2d 1029 (Div. 1 1984)—302.11
Matsyuk v. State Farm Fire & Cas. Co., 173 Wash. 2d 643, 272 P.3d 802 (2012)—310.01
Matter of Arbitration of Fortin, 82 Wash. App. 74, 914 P.2d 1209 (Div. 2 1996)—41.04
Matthews v. Wenatchee Heights Water Co., 92 Wash. App. 541, 963 P.2d 958 (Div. 3 1998)—301.10
Matzger v. Arcade Bldg. & Realty Co., 80 Wash. 401, 141 P. 900 (1914)—303.03
Mauch v. Kissling, 56 Wash. App. 312, 783 P.2d 601 (Div. 3 1989)—50.18
Mavroudis v. Pittsburgh-Corning Corp., 86 Wash. App. 22, 935 P.2d 684 (Div. 1 1997)—15.02
Maxwell v. Piper, 92 Wash. App. 471, 963 P.2d 941 (Div. 2 1998)—70.02
Mayer v. Sto Industries, Inc., 123 Wash. App. 443, 98 P.3d 116 (Div. 2 2004)—110.08
Maynard v. Sisters of Providence, 72 Wash. App. 878, 866 P.2d 1272 (Div. 1 1994)—120.07
Mazon v. Krafchick, 158 Wash. 2d 440, 144 P.3d 1168 (2006)—2.13
McCartney v. Old Line Life Ins. Co. of America, 3 Wash. App. 92, 472 P.2d 581 (Div. 3 1970)—1.02
McClarty v. Totem Elec., 157 Wash. 2d 214, 137 P.3d 844 (2006)—330.00
McClelland v. ITT Rayonier, Inc., 65 Wash. App. 386, 828 P.2d 1138 (Div. 2 1992)—155.03, 155.06
McCluskey v. Handorff-Sherman, 125 Wash. 2d 1, 882 P.2d 157 (1994)—140.01
McCluskey v. Handorff-Sherman, 68 Wash. App. 96, 841 P.2d 1300 (Div. 2 1992)—12.02
McCourtie v. Bayton, 159 Wash. 418, 294 P. 238 (1930)—130.03
McCurdy v. Union Pac. R. Co., 68 Wash. 2d 457, 413 P.2d 617 (1966)—30.10
McCurry v. Chevy Chase Bank, FSB, 169 Wash. 2d 96, 233 P.3d 861 (2010)—340.00
McCutcheon v. Brownfield, 2 Wash. App. 348, 467 P.2d 868 (Div. 1 1970)—301.11
McDonagh v. Department of Labor & Industries, 68 Wash. App. 749, 845 P.2d 1030 (Div. 1 1993)—155.06, 155.20
McDonald v. Department of Labor and Industries, 104 Wash. App. 617, 17 P.3d 1195 (Div. 2 2001)—155.02
McDonald v. Irby, 74 Wash. 2d 431, 445 P.2d 192 (1968)—100.02
McDonnell Douglas Corp. v. Green, 411 U.S. 792, 93 S. Ct. 1817, 36 L. Ed. 2d 668 (1973)—330.01
McDougle v. Department of Labor and Industries, 64 Wash. 2d 640, 393 P.2d 631 (1964)—155.05

McEachren v. Sherwood & Roberts, Inc., 36 Wash. App. 576, 675 P.2d 1266 (Div. 1 1984)—302.03
McFarland v. Commercial Boiler Works, 10 Wash. 2d 81, 116 P.2d 288 (1941)—5.01
McGarvey v. City of Seattle, 62 Wash. 2d 524, 384 P.2d 127 (1963)—30.06
McGautha v. Jackson County, Mo., Collections Dept., 36 F.3d 53 (8th Cir. 1994)—341.02
McGlothlen, Matter of, 99 Wash. 2d 515, 663 P.2d 1330 (1983)—107.01
McGrail v. Department of Labor and Industries, 190 Wash. 272, 67 P.2d 851 (1937)—50.02
McGuckin v. Smith, 974 F.2d 1050, 23 Fed. R. Serv. 3d 922 (9th Cir. 1992)—343.04
McIlwaine v. Tacoma Ry. & Power Co., 72 Wash. 184, 129 P. 1093 (1913)—30.01.04
McKee v. American Home Products, Corp., 113 Wash. 2d 701, 782 P.2d 1045 (1989)—105.01, 105.02, 105.04
McKenna v. Harrison Memorial Hosp., 92 Wash. App. 119, 960 P.2d 486 (Div. 2 1998)—110.04
McKennon v. Nashville Banner Pub. Co., 513 U.S. 352, 115 S. Ct. 879, 130 L. Ed. 2d 852 (1995)—330.81.01
McKenzie v. Lamb, 738 F.2d 1005 (9th Cir. 1984)—342.09
McKinney v. Preston Mill Co., 39 Wash. 2d 681, 237 P.2d 788 (1951)—70.03.05
McKinney v. City of Tukwila, 103 Wash. App. 391, 13 P.3d 631 (Div. 1 2000)—342.10
McKinnon v. Washington Federal Sav. & Loan Ass'n, 68 Wash. 2d 644, 414 P.2d 773 (1966)—120.05
McKown v. Simon Property Group, Inc., 182 Wash. 2d 752, 344 P.3d 661 (2015)—120.00, 120.02.01, 120.06.03
McLaughlin v. Cooke, 112 Wash. 2d 829, 774 P.2d 1171 (1989)—20.05, 105.01
McLaughlin, Matter of, 100 Wash. 2d 832, 676 P.2d 444 (1984)—360.00, 360.01, 360.04, 360.05, 360.06, 360.14, 360.20
McLean v. St. Regis Paper Co., 6 Wash. App. 727, 496 P.2d 571 (Div. 2 1972)—50.01
McLeod v. Grant County School Dist. No. 128, 42 Wash. 2d 316, 255 P.2d 360 (1953)—15.05, 100.01, 100.03
McMillian v. Monroe County, Ala., 520 U.S. 781, 117 S. Ct. 1734, 138 L. Ed. 2d 1 (1997)—341.01
McMoran v. State, 55 Wash. 2d 37, 345 P.2d 598 (1959)—151.03
McRorie v. Shimoda, 795 F.2d 780 (9th Cir. 1986)—341.01, 341.02
Meabon v. State, 1 Wash. App. 824, 463 P.2d 789 (Div. 3 1970)—140.01
Meagher's Estate, In re, 60 Wash. 2d 691, 375 P.2d 148 (1962)—24.03
Medina, City of v. Cook, 69 Wash. 2d 574, 418 P.2d 1020 (1966)—150.05, 150.08, 151.11, 151.13
Meeker v. Johnson, 3 Wash. 247, 28 P. 542 (1891)—302.02

Meissner v. Simpson Timber Co., 69 Wash. 2d 949, 421 P.2d 674 (1966)—301.02
Mellon v. Regional Trustee Services Corp., 182 Wash. App. 476, 334 P.3d 1120 (Div. 3 2014)—310.08
Melosevich v. Cichy, 30 Wash. 2d 702, 193 P.2d 342 (1948)—50.13
Memel v. Reimer, 85 Wash. 2d 685, 538 P.2d 517 (1975)—120.02.01
Memphis Community School Dist. v. Stachura, 477 U.S. 299, 106 S. Ct. 2537, 91 L. Ed. 2d 249, 32 Ed. Law Rep. 1185 (1986)—340.06
Mendelsohn v. Anderson, 26 Wash. App. 933, 614 P.2d 693 (Div. 1 1980)—34.02, 70.02.01, 70.02.06
Mendiola-Martinez v. Arpaio, 836 F.3d 1239 (9th Cir. 2016)—343.00, 343.03
Menzies v. Pearson, 44 Wash. 2d 252, 266 P.2d 1038 (1954)—140.03
Meredith v. Hanson, 40 Wash. App. 170, 697 P.2d 602 (Div. 1 1985)—20.01
Merriman v. American Guarantee & Liability Insurance Company, 198 Wash. App. 594, 396 P.3d 351 (Div. 3 2017)—320.00
Merritt v. Mackey, 932 F.2d 1317 (9th Cir. 1991)—340.01
Meryhew v. Gillingham, 77 Wash. App. 752, 893 P.2d 692 (Div. 1 1995)—107.00
Mesa v. Spokane World Exposition, 18 Wash. App. 609, 570 P.2d 157 (Div. 3 1977)—120.05, 120.06
Mesher v. Osborne, 75 Wash. 439, 134 P. 1092 (1913)—130.01.01, 130.05
Metropolitan Park Dist. of Tacoma v. Griffith, 106 Wash. 2d 425, 723 P.2d 1093 (1986)—302.08, 302.09
Metropolitan Seattle, King County, Municipality of v. Kenmore Properties, Inc., 67 Wash. 2d 923, 410 P.2d 790 (1966)—150.06.01
Meyer v. University of Washington, 105 Wash. 2d 847, 719 P.2d 98, 32 Ed. Law Rep. 791 (1986)—340.02
Michael v. Mosquera-Lacy, 165 Wash. 2d 595, 200 P.3d 695 (2009)—310.09
Michigan v. Fisher, 558 U.S. 45, 130 S. Ct. 546, 175 L. Ed. 2d 410, 58 A.L.R.6th 839 (2009)—342.07
Micro Enhancement Intern., Inc. v. Coopers & Lybrand, LLP, 110 Wash. App. 412, 40 P.3d 1206 (Div. 3 2002)—107.10
Mieske v. Public Utility Dist. No. 1 of Cowlitz County, 42 Wash. 2d 871, 259 P.2d 647 (1953)—31.06.01
Miguel v. Guess, 112 Wash. App. 536, 51 P.3d 89 (Div. 3 2002)—330.00, 341.01
Mike M. Johnson, Inc. v. County of Spokane, 150 Wash. 2d 375, 78 P.3d 161 (2003)—302.07
Miller v. Cody, 41 Wash. 2d 775, 252 P.2d 303 (1953)—70.04
Miller v. Department of Labor and Industries of Washington, 200 Wash. 674, 94 P.2d 764 (1939)—155.20, 155.25
Miller v. Kennedy, 91 Wash. 2d 155, 588 P.2d 734 (1978)—105.07
Miller v. Kennedy, 85 Wash. 2d 151, 530 P.2d 334 (1975)—105.08

Miller v. Kennedy, 11 Wash. App. 272, 522 P.2d 852 (Div. 1 1974)—105.04, 105.05
Miller v. Othello Packers, Inc., 67 Wash. 2d 842, 410 P.2d 33 (1966)—302.11
Miller v. Peterson, 42 Wash. App. 822, 714 P.2d 695 (Div. 1 1986)—105.01
Miller v. Treat, 57 Wash. 2d 524, 358 P.2d 143 (1960)—12.01.01
Milligan v. Thompson, 110 Wash. App. 628, 42 P.3d 418 (Div. 2 2002)—330.05
Mills v. Orcas Power & Light Co., 56 Wash. 2d 807, 355 P.2d 781 (1960)—135.01
Mills v. Pacific County, 48 Wash. 2d 211, 292 P.2d 362 (1956)—24.03
Mills v. Park, 67 Wash. 2d 717, 409 P.2d 646 (1966)—12.02
Mills v. Estate of Schwartz, 44 Wash. App. 578, 722 P.2d 1363 (Div. 1 1986)—370.12
Millson v. City of Lynden, 174 Wash. App. 303, 298 P.3d 141 (Div. 1 2013)—140.01
Milne v. City of Seattle, 20 Wash. 2d 30, 145 P.2d 888 (1944)—20.01, 70.02
Mina v. Boise Cascade Corp., 37 Wash. App. 445, 681 P.2d 880 (Div. 3 1984)—70.05
Miniken v. Carr, 71 Wash. 2d 325, 428 P.2d 716 (1967)—120.06
Minnesota v. Olson, 495 U.S. 91, 110 S. Ct. 1684, 109 L. Ed. 2d 85 (1990)—342.07
Miotke v. City of Spokane, 101 Wash. 2d 307, 678 P.2d 803 (1984)—380.00
Mission Springs, Inc. v. City of Spokane, 134 Wash. 2d 947, 954 P.2d 250 (1998)—340.06, 341.02
Mississippi & Rum River Boom Co. v. Patterson, 98 U.S. 403, 25 L. Ed. 206, 1878 WL 18388 (1878)—150.09
Missouri v. McNeely, 569 U.S. 141, 133 S. Ct. 1552, 185 L. Ed. 2d 696 (2013)—342.07
Mitchell v. Forsyth, 472 U.S. 511, 105 S. Ct. 2806, 86 L. Ed. 2d 411, 2 Fed. R. Serv. 3d 221 (1985)—340.01
Mitchell v. Straith, 40 Wash. App. 405, 698 P.2d 609 (Div. 1 1985)—302.03
MJD Properties, LLC v. Haley, 189 Wash. App. 963, 358 P.3d 476 (Div. 1 2015)—380.00, 380.01, 380.03
Mohr v. Grant, 153 Wash. 2d 812, 108 P.3d 768 (2005)—21.01
Mohr v. Grantham, 172 Wash. 2d 844, 262 P.3d 490 (2011)—105.02.03, 105.09
Monell v. Department of Social Services of City of New York, 436 U.S. 658, 98 S. Ct. 2018, 56 L. Ed. 2d 611 (1978)—340.00, 340.06, 341.01, 341.02, 343.00
Monroe v. Pape, 365 U.S. 167, 81 S. Ct. 473, 5 L. Ed. 2d 492 (1961)—340.00
Montag by Montag v. Honda Motor Co., Ltd., 75 F.3d 1414, 43 Fed. R. Evid. Serv. 1065 (10th Cir. 1996)—110.02.03

Montgomery Ward & Co., Inc. v. Annuity Bd. of Southern Baptist Convention, 16 Wash. App. 439, 556 P.2d 552 (Div. 3 1976)—301.09
Moore v. Commercial Aircraft Interiors, LLC, 168 Wash. App. 502, 278 P.3d 197 (Div. 1 2012)—352.01, 352.01.01, 352.03, 352.04
Moore v. Steve's Outboard Service, 182 Wash. 2d 151, 339 P.3d 169 (2014)—380.00, 380.04
Moore v. Union Pacific R.R., 83 Wash. App. 112, 920 P.2d 616 (Div. 3 1996)—12.02
Moratti ex rel. Tarutis v. Farmers Ins. Co. of Washington, 162 Wash. App. 495, 254 P.3d 939 (Div. 1 2011)—310.06, 310.07, 320.05
Morgan v. Johnson, 137 Wash. 2d 887, 976 P.2d 619 (1999)—12.01, 14.02, 16.03
Morgan v. Woessner, 997 F.2d 1244 (9th Cir. 1993)—348.02
Morin v. Johnson, 49 Wash. 2d 275, 300 P.2d 569 (1956)—380.03
Morinaga v. Vue, 85 Wash. App. 822, 935 P.2d 637 (Div. 3 1997)—60.04, 105.04, 340.06
Mork v. Department of Labor and Industries, 48 Wash. 2d 74, 291 P.2d 650 (1955)—155.20
Morris v. Blaker, 118 Wash. 2d 133, 821 P.2d 482 (1992)—360.06, 360.12
Morris v. Northwestern Imp. Co., 53 Wash. 451, 102 P. 402 (1909)—50.04
Morrison v. McKillop, 17 Wash. App. 396, 563 P.2d 220 (Div. 1 1977)—6.13
Morse v. City of Toppenish, 46 Wash. App. 60, 729 P.2d 638 (Div. 3 1986)—110.08
Morton v. De Oliveira, 984 F.2d 289 (9th Cir. 1993)—100.04
Morton v. Lee, 75 Wash. 2d 393, 450 P.2d 957 (1969)—120.06.02
Mt. Healthy City School Dist. Bd. of Educ. v. Doyle, 429 U.S. 274, 97 S. Ct. 568, 50 L. Ed. 2d 471 (1977)—340.06
Mucsi v. Graoch Associates Ltd. Partnership No. 12, 144 Wash. 2d 847, 31 P.3d 684 (2001)—120.00, 120.07, 130.00, 130.01
Murphy v. Montgomery Elevator Co., 65 Wash. App. 112, 828 P.2d 584 (Div. 2 1992)—100.02
Murray v. Mossman, 52 Wash. 2d 885, 329 P.2d 1089 (1958)—30.08.01
Murray Pub. Co., Inc. v. Malmquist, 66 Wash. App. 318, 832 P.2d 493 (Div. 1 1992)—352.02
Mutual of Enumclaw Ins. Co. v. Dan Paulson Const., Inc., 161 Wash. 2d 903, 169 P.3d 1 (2007)—310.07, 320.01.01, 320.02
Mutual of Enumclaw Insurance Company v. Day, 197 Wash. App. 47, 387 P.3d 1084 (Div. 1 2016)—301.08
Mylnar v. Hall, 55 Wash. 2d 739, 350 P.2d 440 (1960)—72.05

N

Nania v. Pacific Northwest Bell Telephone Co., Inc., 60 Wash. App. 706, 806 P.2d 787 (Div. 3 1991)—45.21
Nash v. Department of Labor and Industries, 1 Wash. App. 705, 462 P.2d 988 (Div. 1 1969)—155.02, 155.07

National R.R. Passenger Corp. v. Morgan, 536 U.S. 101, 122 S. Ct. 2061, 153 L. Ed. 2d 106 (2002)—330.81
Nationwide Mut. Fire Ins. Co. v. Watson, 120 Wash. 2d 178, 840 P.2d 851 (1992)—301.04, 301.08
Neil v. Biggers, 409 U.S. 188, 93 S. Ct. 375, 34 L. Ed. 2d 401 (1972)—341.04
Nelson v. Broderick & Bascom Rope Co., 53 Wash. 2d 239, 332 P.2d 460 (1958)—50.07
Nelson v. City of Davis, 709 F. Supp. 2d 978 (E.D. Cal. 2010)—342.03
Nelson v. Fairfield, 40 Wash. 2d 496, 244 P.2d 244 (1952)—30.07.01
Nelson v. Schubert, 98 Wash. App. 754, 994 P.2d 225 (Div. 1 2000)—24.03
Nelson v. City of Tacoma, 19 Wash. App. 807, 577 P.2d 986 (Div. 3 1978)—140.01
Nelson, In re Estate of, 85 Wash. 2d 602, 537 P.2d 765 (1975)—301A.01
Nevue v. Close, 123 Wash. 2d 253, 867 P.2d 635 (1994)—301.08
Newport, City of v. Fact Concerts, Inc., 453 U.S. 247, 101 S. Ct. 2748, 69 L. Ed. 2d 616, 31 Fed. R. Serv. 2d 1387 (1981)—348.02
Nichols v. Frank, 42 F.3d 503 (9th Cir. 1994)—330.23
Nichols v. Lackie, 58 Wash. App. 904, 795 P.2d 722 (Div. 2 1990)—6.10.02, 30.01.01
Niebarger v. City of Seattle, 53 Wash. 2d 228, 332 P.2d 463 (1958)—140.02
Niece v. Elmview Group Home, 131 Wash. 2d 39, 929 P.2d 420 (1997)—15.05, 50.02, 50.04, 100.03
Nielson v. Eisenhower & Carlson, 100 Wash. App. 584, 999 P.2d 42 (Div. 2 2000)—107.07
Nist v. Tudor, 67 Wash. 2d 322, 407 P.2d 798 (1965)—10.07
Nivens v. 7-11 Hoagy's Corner, 133 Wash. 2d 192, 943 P.2d 286 (1997)—120.06.03
N.K. v. Corporation of Presiding Bishop of Church of Jesus Christ of Latter-Day Saints, 175 Wash. App. 517, 307 P.3d 730 (Div. 1 2013)—15.05
N.L. v. Bethel School District, 186 Wash. 2d 422, 378 P.3d 162, 333 Ed. Law Rep. 939 (2016)—10.01
Nord v. Eastside Ass'n Ltd., 34 Wash. App. 796, 664 P.2d 4 (Div. 1 1983)—301.10
Nordstrom v. White Metal Rolling & Stamping Corp., 75 Wash. 2d 629, 453 P.2d 619 (1969)—6.05
Nordstrom, Inc. v. Tampourlos, 107 Wash. 2d 735, 733 P.2d 208 (1987)—310.01
Norland v. Peterson, 169 Wash. 380, 13 P.2d 483 (1932)—5.01
North Coast R. Co. v. Newman, 66 Wash. 374, 119 P. 823 (1911)—151.09
Northwest Independent Forest Mfrs. v. Department of Labor and Industries, 78 Wash. App. 707, 899 P.2d 6 (Div. 2 1995)—300.01
Novak v. Piggly Wiggly Puget Sound Co., Inc., 22 Wash. App. 407, 591 P.2d 791 (Div. 2 1979)—110.03

O

Oberlander v. Cox, 75 Wash. 2d 189, 449 P.2d 388 (1969)—70.03, 70.03.01, 70.03.03
O'Brien v. Hafer, 122 Wash. App. 279, 93 P.3d 930 (Div. 1 2004)—50.01
O'Brien v. City of Seattle, 52 Wash. 2d 543, 327 P.2d 433 (1958)—1.08
Ochampaugh v. City of Seattle, 91 Wash. 2d 514, 588 P.2d 1351 (1979)—120.02, 120.04
Ohio v. Robinette, 519 U.S. 33, 117 S. Ct. 417, 136 L. Ed. 2d 347, 148 A.L.R. Fed. 739 (1996)—342.06
Oliver v. Cook, 194 Wash. App. 532, 377 P.3d 265 (Div. 2 2016)—120.07
Oliver v. Flow Intern. Corp., 137 Wash. App. 655, 155 P.3d 140 (Div. 1 2006)—301.09
Oliver v. Harvey, 31 Wash. App. 279, 640 P.2d 1087 (Div. 1 1982)—70.02.01, 70.02.06
Oliver v. Pacific Northwest Bell Telephone Co., Inc., 106 Wash. 2d 675, 724 P.2d 1003 (1986)—330.02
Olsen Media v. Energy Sciences, Inc., 32 Wash. App. 579, 648 P.2d 493 (Div. 1 1982)—302.04
Olson v. City of Bellevue, 93 Wash. App. 154, 968 P.2d 894 (Div. 1 1998)—140.04
Olympia, City of v. Sprout, 5 Wash. App. 897, 492 P.2d 586 (Div. 2 1971)—70.02.03
Olympic Fish Products, Inc. v. Lloyd, 93 Wash. 2d 596, 611 P.2d 737 (1980)—352.04
Omni Group, Inc. v. Seattle-First Nat. Bank, 32 Wash. App. 22, 645 P.2d 727 (Div. 1 1982)—301.02
Oncale v. Sundowner Offshore Services, Inc., 523 U.S. 75, 118 S. Ct. 998, 140 L. Ed. 2d 201 (1998)—330.23
O'Neill v. City of Port Orchard, 194 Wash. App. 759, 375 P.3d 709 (Div. 2 2016)—140.01
Oregon Mut. Ins. Co. v. Barton, 109 Wash. App. 405, 36 P.3d 1065 (Div. 3 2001)—302.07
Orme v. Watkins, 44 Wash. 2d 325, 267 P.2d 681 (1954)—30.06
Orr v. Department of Labor and Industries, 10 Wash. App. 697, 519 P.2d 1334 (Div. 2 1974)—155.08
Ortega v. O'Connor, 146 F.3d 1149 (9th Cir. 1998)—340.01
Ortiz-Sandoval v. Clarke, 323 F.3d 1165 (9th Cir. 2003)—342.07
Osborn v. Chapman, 62 Wash. 2d 495, 384 P.2d 117 (1963)—12.01.01
Osborn v. Public Hospital Dist. I, Grant County, 80 Wash. 2d 201, 492 P.2d 1025 (1972)—105.02.01, 105.02.02
Osborne v. Seymour, 164 Wash. App. 820, 265 P.3d 917 (Div. 2 2011)—340.06
Ostad v. Oregon Health Sciences University, 327 F.3d 876, 175 Ed. Law Rep. 494, 61 Fed. R. Evid. Serv. 861 (9th Cir. 2003)—340.06
Otani ex rel. Shigaki v. Broudy, 151 Wash. 2d 750, 92 P.3d 192 (2004)—31.01.01
Otter v. Department of Labor and Industries, 11 Wash. 2d 51, 118 P.2d 413 (1941)—2.07

Owen v. Burlington Northern and Santa Fe R.R. Co., 153 Wash. 2d 780, 108 P.3d 1220 (2005)—140.01, 140.01.01
Owens v. Harrison, 120 Wash. App. 909, 86 P.3d 1266 (Div. 1 2004)—107.00

P

Pacheco v. Ames, 149 Wash. 2d 431, 69 P.3d 324, 11 A.L.R.6th 913 (2003)—22.01
Pacific Aerospace & Electronics, Inc. v. Taylor, 295 F. Supp. 2d 1205 (E.D. Wash. 2003)—351.03, 351.05
Pacific Cascade Corp. v. Nimmer, 25 Wash. App. 552, 608 P.2d 266 (Div. 3 1980)—301.02
Pacific County v. Astoria North Beach Ferry Co., 170 Wash. 643, 17 P.2d 40 (1932)—151.06
Pacific Mut. Life Ins. Co. v. Haslip, 499 U.S. 1, 111 S. Ct. 1032, 113 L. Ed. 2d 1 (1991)—348.02
Pacific Northwest Pipeline Corp. v. Myers, 50 Wash. 2d 288, 311 P.2d 655 (1957)—150.06.01, 150.10, 150.14, 150.15
Pacific Northwest Shooting Park Ass'n v. City of Sequim, 158 Wash. 2d 342, 144 P.3d 276 (2006)—352.01, 352.02
Padron v. Goodyear Tire & Rubber Co., 34 Wash. App. 473, 662 P.2d 67 (Div. 3 1983)—110.04
Paetsch v. Spokane Dermatology Clinic, PS, 182 Wn.2d 843, 348 P.3d 389 (2015)—105.08
Pakka v. Fitzpatrick, 53 Wash. 2d 356, 333 P.2d 917 (1959)—12.03
Palmer v. Jensen, 132 Wash. 2d 193, 937 P.2d 597 (1997)—30.07.01
Palmer v. Jensen, 81 Wash. App. 148, 913 P.2d 413 (Div. 2 1996)—70.04
Palmer v. City of Puyallup, 50 Wash. 2d 627, 313 P.2d 1114 (1957)—140.02
Panag v. Farmers Ins. Co. of Washington, 166 Wash. 2d 27, 204 P.3d 885 (2009)—310.02, 310.06, 310.07, 310.08
Pande Cameron and Co. of Seattle, Inc. v. Central Puget Sound Regional Transit Authority, 610 F. Supp. 2d 1288 (W.D. Wash. 2009)—151.01
Panorama Residential Protective Ass'n v. Panorama Corp. of Washington, 97 Wash. 2d 23, 640 P.2d 1057 (1982)—302.07
Panorama Village Homeowners Ass'n v. Golden Rule Roofing, Inc., 102 Wash. App. 422, 10 P.3d 417 (Div. 1 2000)—303.03
Pappas v. Zerwoodis, 21 Wash. 2d 725, 153 P.2d 170 (1944)—303.03, 303.04
Paradise, Inc. v. Pierce County, 124 Wash. App. 759, 102 P.3d 173 (Div. 1 2004)—380.04
Park Avenue Condominium Owners Ass'n v. Buchan Developments, L.L.C., 117 Wash. App. 369, 71 P.3d 692 (Div. 1 2003)—302.03
Parkhurst v. Elliott, 103 Wash. 89, 173 P. 731 (1918)—150.08
Parkins v. Van Doren Sales, Inc., 45 Wash. App. 19, 724 P.2d 389 (Div. 3 1986)—110.04
Parks v. Department of Labor and Industries, 46 Wash. 2d 895, 286 P.2d 104 (1955)—155.09

Parrilla v. King County, 138 Wash. App. 427, 157 P.3d 879 (Div. 1 2007)—100.01, 100.03
Parris v. Johnson, 3 Wash. App. 853, 479 P.2d 91 (Div. 2 1970)—30.05
Parrish v. Jones, 44 Wash. App. 449, 722 P.2d 878 (Div. 1 1986)—31.01.01
Parsons v. St. Joseph's Hosp. and Health Care Center, 70 Wash. App. 804, 856 P.2d 702 (Div. 2 1993)—330.32
Patterson v. Horton, 84 Wash. App. 531, 929 P.2d 1125 (Div. 2 1997)—30.07.01, 30.07.02, 70.08
Patterson, In re, 90 Wash. 2d 144, 579 P.2d 1335 (1978)—360.05
Payne v. Children's Home Soc. of Washington, Inc., 77 Wash. App. 507, 892 P.2d 1102 (Div. 3 1995)—330.23
Payne v. Paugh, 190 Wash. App. 383, 360 P.3d 39 (Div. 1 2015)—110.02.01
Payne v. Ryan, 183 Wash. 590, 49 P.2d 53 (1935)—302.08
Peacock v. Piper, 81 Wash. 2d 731, 504 P.2d 1124 (1973)—24.03
Pearce v. Motel 6, Inc., 28 Wash. App. 474, 624 P.2d 215 (Div. 2 1981)—20.01, 120.06, 120.07
Pearson v. Callahan, 555 U.S. 223, 129 S. Ct. 808, 172 L. Ed. 2d 565 (2009)—340.01
Pederson v. Dumouchel, 72 Wash. 2d 73, 431 P.2d 973, 31 A.L.R.3d 1100 (1967)—105.02.01
Pedroza v. Bryant, 101 Wash. 2d 226, 677 P.2d 166 (1984)—105.02.01, 105.02.02
Peizer v. City of Seattle, 174 Wash. 95, 24 P.2d 444 (1933)—2.07
Pena-Rodriguez v. Colorado, 137 S. Ct. 855, 197 L. Ed. 2d 107, 102 Fed. R. Evid. Serv. 1084 (2017)—1.01, 1.08, 1.11, 150.16, 360.01, 360.20, 365.01, 365.20, 365.30
Pennington, In re Marriage of, 142 Wash. 2d 592, 14 P.3d 764 (2000)—24.03
Peoples Mortg. Co. v. Vista View Builders, 6 Wash. App. 744, 496 P.2d 354 (Div. 1 1972)—301.02
Peralta v. Dillard, 744 F.3d 1076 (9th Cir. 2014)—343.00
Perez-Crisantos v. State Farm Fire and Casualty Company, 187 Wash. 2d 669, 389 P.3d 476 (2017)—320.06, 320.06.01
Perez v. Pappas, 98 Wash. 2d 835, 659 P.2d 475 (1983)—107.09
Petcu v. State, 121 Wash. App. 36, 86 P.3d 1234 (Div. 2 2004)—15.05
Peter Kiewit Sons' Co. v. Washington State Dept. of Transp., 30 Wash. App. 424, 635 P.2d 740 (Div. 2 1981)—301.09
Peters v. Simmons, 87 Wash. 2d 400, 552 P.2d 1053 (1976)—107.00
Peters v. Skalman, 27 Wash. App. 247, 617 P.2d 448 (Div. 2 1980)—24.01
Peterson v. Littlejohn, 56 Wash. App. 1, 781 P.2d 1329 (Div. 1 1989)—348.02
Peterson v. City of Seattle, 51 Wash. 2d 187, 316 P.2d 904 (1957)—100.09
Petters v. Williamson & Associates, Inc., 151 Wash. App. 154, 210 P.3d 1048 (Div. 1 2009)—351.01

Pflugmacher v. Thomas, 34 Wash. 2d 687, 209 P.2d 443 (1949)—72.05
Phennah v. Whalen, 28 Wash. App. 19, 621 P.2d 1304 (Div. 1 1980)—30.01.01, 110.02.02
Philip Morris USA v. Williams, 549 U.S. 346, 127 S. Ct. 1057, 166 L. Ed. 2d 940 (2007)—348.02
Philippides v. Bernard, 151 Wash. 2d 376, 88 P.3d 939 (2004)—31.06.01
Phillips v. Hardwick, 29 Wash. App. 382, 628 P.2d 506 (Div. 1 1981)—14.03, 14.03.02
Phillips v. Kaiser Aluminum & Chemical Corp., 74 Wash. App. 741, 875 P.2d 1228 (Div. 2 1994)—30.08.02
Phillips v. King County, 136 Wash. 2d 946, 968 P.2d 871 (1998)—150.05
Pickering v. Board of Ed. of Tp. High School Dist. 205, Will County, Illinois, 391 U.S. 563, 88 S. Ct. 1731, 20 L. Ed. 2d 811 (1968)—340.06
Pierce v. Multnomah County, Or., 76 F.3d 1032 (9th Cir. 1996)—340.01, 342.03, 343.08
Pierce v. Northeast Lake Washington Sewer and Water Dist., 123 Wash. 2d 550, 870 P.2d 305 (1994)—151.01
Pierce County v. Duffy, 104 Wash. 426, 176 P. 670 (1918)—150.05, 151.15
Pierce County v. State, 144 Wash. App. 783, 185 P.3d 594 (Div. 2 2008)—301.02, 301A.02
Pietz v. Indermuehle, 89 Wash. App. 503, 949 P.2d 449 (Div. 2 1998)—50.14
Pimentel v. Roundup Co., 100 Wash. 2d 39, 666 P.2d 888 (1983)—120.06.02
Pinckney v. Smith, 484 F. Supp. 2d 1177 (W.D. Wash. 2007)—130.00, 130.06
Piris v. Kitching, 185 Wash. 2d 856, 375 P.3d 627 (2016)—107.00, 107.08
Planet Ins. Co. v. Wong, 74 Wash. App. 905, 877 P.2d 198 (Div. 1 1994)—320.00
Pleas v. City of Seattle, 112 Wash. 2d 794, 774 P.2d 1158 (1989)—352.01, 352.01.01, 352.02.01, 352.03, 352.04, 352.05
Pleuss v. City of Seattle, 8 Wn.App. 133,137, 504 P.2d 1191 (1972)—301.10
Pleuss v. City of Seattle, 8 Wash. App. 133, 504 P.2d 1191 (Div. 1 1972)—301.10
Plumbers and Steamfitters Union Local 598 v. Washington Public Power Supply System, 44 Wash. App. 906, 724 P.2d 1030 (Div. 3 1986)—352.06
Plumbing Shop, Inc. v. Pitts, 67 Wash. 2d 514, 408 P.2d 382 (1965)—301.02
Portman v. County of Santa Clara, 995 F.2d 898 (9th Cir. 1993)—340.00, 340.02
Poston v. Mathers, 77 Wash. 2d 329, 462 P.2d 222 (1969)—11.05
Potts v. Amis, 62 Wash. 2d 777, 384 P.2d 825 (1963)—120.03, 120.08.01
Poutre v. Saunders, 19 Wash. 2d 561, 143 P.2d 554 (1943)—50.13, 72.04

Powell v. Associated Counsel for Accused, 131 Wash. App. 810, 129 P.3d 831 (Div. 1 2006)—107.00
Powell v. Associated Counsel for Accused, 125 Wash. App. 773, 106 P.3d 271 (Div. 1 2005)—107.08
Powell v. Superior Portland Cement, 15 Wash. 2d 14, 129 P.2d 536 (1942)—380.06
Precision Moulding & Frame, Inc. v. Simpson Door Co., 77 Wash. App. 20, 888 P.2d 1239 (Div. 1 1995)—351.05
Price v. Department of Labor and Industries of State of Wash., 101 Wash. 2d 520, 682 P.2d 307 (1984)—155.09
Price v. Kitsap Transit, 125 Wash. 2d 456, 886 P.2d 556 (1994)—10.05, 11.03, 11.04, 31.06.01, 32.06.01, 41.04, 100.01
Provins v. Bevis, 70 Wash. 2d 131, 422 P.2d 505 (1967)—140.01
Provost v. Puget Sound Power and Light Co., 103 Wash. 2d 750, 696 P.2d 1238 (1985)—32.04
Pruitt v. Savage, 128 Wash. App. 327, 115 P.3d 1000 (Div. 2 2005)—120.00, 130.00, 130.06
Pruneda v. Otis Elevator Co., 65 Wash. App. 481, 828 P.2d 642 (Div. 1 1992)—100.01, 100.02
Prybysz v. City of Spokane, 24 Wash. App. 452, 601 P.2d 1297 (Div. 3 1979)—140.01.01
P.S., In re, 75 Wash. App. 571, 879 P.2d 294 (Div. 1 1994)—360.13
Public Utility Dist. No. 1 of Lewis County v. Washington Public Power Supply System, 104 Wash. 2d 353, 705 P.2d 1195 (1985)—301.08, 302.05
Public Utility Dist. No. 2 of Pacific County v. Comcast of Washington IV, Inc., 184 Wash. App. 24, 336 P.3d 65 (Div. 1 2014)—303.06
Pudmaroff v. Allen, 138 Wash. 2d 55, 977 P.2d 574 (1999)—70.03, 70.03.01, 70.09
Puget Sound Service Corp. v. Bush, 45 Wash. App. 312, 724 P.2d 1127 (Div. 1 1986)—302.02, 302.04, 302.08
Pugh, In re, 68 Wash. App. 687, 845 P.2d 1034 (Div. 2 1993)—360.13, 360.13.01
Pulcino v. Federal Express Corp., 141 Wash. 2d 629, 9 P.3d 787 (2000)—330.31, 330.34
Purcell v. Warburton, 70 Wash. 129, 126 P. 89 (1912)—303.03
Purchase v. Meyer, 108 Wash. 2d 220, 737 P.2d 661 (1987)—370.01, 370.02, 370.07
Puyallup, City of v. Hogan, 168 Wash. App. 406, 277 P.3d 49 (Div. 2 2012)—303.06
Pybus Steel Co. v. Department of Labor and Industries, 12 Wash. App. 436, 530 P.2d 350 (Div. 3 1975)—155.31

Q

Quadra Enterprises, Inc. v. R.A. Hanson Co., Inc., 35 Wash. App. 523, 667 P.2d 1120 (Div. 1 1983)—352.06
Qualls v. Golden Arrow Farms, 47 Wash. 2d 599, 288 P.2d 1090 (1955)—15.05

Queen Anne Boulevard, In re, 77 Wash. 91, 137 P. 435 (1913)—150.07
Quimby v. Fine, 45 Wash. App. 175, 724 P.2d 403 (Div. 1 1986)—105.01, 105.04, 105.06
Quine v. Department of Labor and Industries, 14 Wash. App. 340, 540 P.2d 927 (Div. 3 1975)—155.11
Quynn v. Bellevue School District, 195 Wash. App. 627, 383 P.3d 1053, 337 Ed. Law Rep. 526 (Div. 1 2016)—10.01, 100.01, 100.03

R

Ramirez v. Dimond, 70 Wash. App. 729, 855 P.2d 338 (Div. 3 1993)—34.04
Ramos v. Arnold, 141 Wash. App. 11, 169 P.3d 482 (Div. 1 2007)—310.09
Randmel, Estate of v. Pounds, 38 Wash. App. 401, 685 P.2d 638 (Div. 1 1984)—301.11
Rash v. Providence Health & Services, 183 Wash. App. 612, 334 P.3d 1154 (Div. 3 2014)—15.02, 105.09
Rasor v. Retail Credit Co., 87 Wash. 2d 516, 554 P.2d 1041 (1976)—30.06
Rathke v. Roberts, 33 Wash. 2d 858, 207 P.2d 716 (1949)—303.01, 303.03, 303.04
Ravenscroft v. Washington Water Power Co., 136 Wash. 2d 911, 969 P.2d 75 (1998)—120.07
Ravsten v. Department of Labor and Industries, 108 Wash. 2d 143, 736 P.2d 265 (1987)—155.13
R.A.W., In re, 104 Wash. App. 215, 15 P.3d 705 (Div. 2 2001)—360.04, 360.05, 360.12
Ray v. Henderson, 217 F.3d 1234 (9th Cir. 2000)—330.06
Raybell v. State, 6 Wash. App. 795, 496 P.2d 559 (Div. 2 1972)—140.01.01
RCM Supply Co., Inc. v. Hunter Douglas, Inc., 686 F.2d 1074 (4th Cir. 1982)—301A.01, 303.05
Re v. Tenney, 56 Wash. App. 394, 783 P.2d 632 (Div. 3 1989)—135.01
Real v. Driscoll Strawberry Associates, Inc., 603 F.2d 748, 51 A.L.R. Fed. 689 (9th Cir. 1979)—330.90
Red-Samm Mining Co., Inc. v. Port of Seattle, 8 Wash. App. 610, 508 P.2d 175 (Div. 1 1973)—301.10
Redman v. County of San Diego, 942 F.2d 1435 (9th Cir. 1991)—341.01, 343.06
Reece v. Good Samaritan Hosp., 90 Wash. App. 574, 953 P.2d 117 (Div. 2 1998)—110.00
Reeder v. Sears, Roebuck & Co., 41 Wash. 2d 550, 250 P.2d 518 (1952)—30.17, 30.18
Reefer Queen Co. v. Marine Const. & Design Co., 73 Wash. 2d 774, 440 P.2d 448 (1968)—303.04
Reese v. Sears, Roebuck & Co., 107 Wash. 2d 563, 731 P.2d 497 (1987)—330.81
Regan v. City of Seattle, 76 Wash. 2d 501, 458 P.2d 12 (1969)—13.03

Reichelt v. Johns-Manville Corp., 107 Wash. 2d 761, 733 P.2d 530 (1987)—32.04
Reid v. Pierce County, 136 Wash. 2d 195, 961 P.2d 333 (1998)—14.03, 14.03.01, 14.03.02, 14.03.04, 30.06
Renton, City of v. Scott Pac. Terminal, Inc., 9 Wash. App. 364, 512 P.2d 1137 (Div. 1 1973)—150.11, 151.05, 151.06, 151.07
Revere, City of v. Massachusetts General Hosp., 463 U.S. 239, 103 S. Ct. 2979, 77 L. Ed. 2d 605 (1983)—342.03
Reynolds v. Hicks, 134 Wash. 2d 491, 951 P.2d 761 (1998)—370.12
Rhoades v. City of Battle Ground, 115 Wash. App. 752, 63 P.3d 142 (Div. 2 2002)—302.05
Rhoades v. DeRosier, 14 Wash. App. 946, 546 P.2d 930 (Div. 1 1976)—70.04
Riblet v. Spokane-Portland Cement Co., 41 Wash. 2d 249, 248 P.2d 380 (1952)—380.03
Rice v. Dow Chemical Co., 124 Wash. 2d 205, 875 P.2d 1213 (1994)—110.08
Rice v. Johnson, 62 Wash. 2d 591, 384 P.2d 383 (1963)—2.10
Richards v. Overlake Hosp. Medical Center, 59 Wash. App. 266, 796 P.2d 737 (Div. 1 1990)—15.01, 105.01, 105.02
Richland School Dist. v. Mabton School Dist., 111 Wash. App. 377, 45 P.3d 580, 164 Ed. Law Rep. 476 (Div. 3 2002)—165.00
Rickman v. Premera Blue Cross, 184 Wash. 2d 300, 358 P.3d 1153 (2015)—330.00, 330.50, 330.51
Riddel v. Lyon, 124 Wash. 146, 213 P. 487, 37 A.L.R. 486 (1923)—30.08.01
Ridge v. Kladnick, 42 Wash. App. 785, 713 P.2d 1131 (Div. 1 1986)—13.03
Riehl v. Foodmaker, Inc., 152 Wash. 2d 138, 94 P.3d 930 (2004)—330.00, 330.41
Rife v. Oklahoma Department of Public Safety, 854 F.3d 637 (10th Cir. 2017)—343.00
Riley v. California, 573 U.S. 373, 134 S. Ct. 2473, 189 L. Ed. 2d 430 (2014)—342.04, 342.05
Ringaard v. Allen Lubricating Co., 147 Wash. 653, 267 P. 43 (1928)—15.04
Rinks v. Bearss, 83 Wash. App. 334, 921 P.2d 558 (Div. 1 1996)—15.05, 370.09
Ripley v. Lanzer, 152 Wash. App. 296, 215 P.3d 1020 (Div. 1 2009)—22.01
Riverside, County of v. McLaughlin, 500 U.S. 44, 111 S. Ct. 1661, 114 L. Ed. 2d 49 (1991)—342.03
R/L Associates, Inc. v. City of Seattle, 113 Wash. 2d 402, 780 P.2d 838 (1989)—340.00
Robbins, Geller, Rudman & Dowd, LLP v. State, 179 Wash. App. 711, 328 P.3d 905 (Div. 2 2014)—351.08
Robblee v. Robblee, 68 Wash. App. 69, 841 P.2d 1289 (Div. 1 1992)—303.02, 303.06

Robel v. Roundup Corp., 148 Wash. 2d 35, 59 P.3d 611 (2002)—14.03, 14.03.01, 15.02, 330.00, 330.01.02, 330.21, 330.23, 330.24
Roberts v. Dudley, 140 Wash. 2d 58, 993 P.2d 901 (2000)—330.00
Roberts v. Johnson, 91 Wash. 2d 182, 588 P.2d 201 (1978)—72.01, 72.02
Robinson v. Lindsay, 92 Wash. 2d 410, 598 P.2d 392 (1979)—10.05
Robinson v. Prunty, 249 F.3d 862 (9th Cir. 2001)—343.06
Robinson v. City of Seattle, 119 Wash. 2d 34, 830 P.2d 318 (1992)—302.06, 340.02
Robinson v. Solano County, 278 F.3d 1007 (9th Cir. 2002)—342.01, 342.03
Robison v. Cascade Hardwoods, Inc., 117 Wash. App. 552, 72 P.3d 244 (Div. 2 2003)—22.01
Robison v. Simard, 57 Wash. 2d 850, 360 P.2d 153 (1961)—60.01.01, 70.01
Rochin v. California, 342 U.S. 165, 72 S. Ct. 205, 96 L. Ed. 183, 25 A.L.R.2d 1396 (1952)—342.03
Roe v. Ludtke Trucking, Inc., 46 Wash. App. 816, 732 P.2d 1021 (Div. 1 1987)—31.02.01
Roeber v. Dowty Aerospace Yakima, 116 Wash. App. 127, 64 P.3d 691 (Div. 3 2003)—330.32
Roger Crane & Associates, Inc. v. Felice, 74 Wash. App. 769, 875 P.2d 705 (Div. 3 1994)—352.01
Rogers v. Bray, 16 Wash. App. 494, 557 P.2d 28 (Div. 3 1976)—120.02
Rogers v. Miles Laboratories, Inc., 116 Wash. 2d 195, 802 P.2d 1346 (1991)—110.02.01
Rollins v. King County Metro Transit, 148 Wash. App. 370, 199 P.3d 499 (Div. 1 2009)—15.04, 110.02.04
Rooker v. Fidelity Trust Co., 263 U.S. 413, 44 S. Ct. 149, 68 L. Ed. 362 (1923)—340.00
Roper v. Mabry, 15 Wash. App. 819, 551 P.2d 1381 (Div. 3 1976)—30.06
Rose v. Anderson Hay and Grain Co., 184 Wash. 2d 268, 358 P.3d 1139 (2015)—330.00, 330.50, 330.51
Rose v. Nevitt, 56 Wash. 2d 882, 355 P.2d 776 (1960)—10.04
Rosellini v. Banchero, 83 Wash. 2d 268, 517 P.2d 955 (1974)—301.07
Rosen v. Ascentry Technologies, Inc., 143 Wash. App. 364, 177 P.3d 765 (Div. 1 2008)—300.02
Rosendahl v. Lesourd Methodist Church, 68 Wash. 2d 180, 412 P.2d 109 (1966)—11.01
Rosengren v. City of Seattle, 149 Wash. App. 565, 205 P.3d 909 (Div. 1 2009)—135.01
Rosenstrom v. North Bend Stage Line, 154 Wash. 57, 280 P. 932 (1929)—5.01
Ross v. Harding, 64 Wash. 2d 231, 391 P.2d 526 (1964)—300.02, 302.02
Ross v. Kirner, 162 Wash. 2d 493, 172 P.3d 701 (2007)—165.01, 165.05
Ross v. Raymer, 32 Wash. 2d 128, 201 P.2d 129 (1948)—301.02
Ross v. Scannell, 97 Wash. 2d 598, 647 P.2d 1004 (1982)—107.08
Rossiter v. Moore, 59 Wash. 2d 722, 370 P.2d 250 (1962)—130.03

Roth v. Union Depot Co., 13 Wash. 525, 43 P. 641 (1896)—11.04
Roumel v. Fude, 62 Wash. 2d 397, 383 P.2d 283 (1963)—70.04
Rousso v. State, 149 Wash. App. 344, 204 P.3d 243 (Div. 1 2009)—340.00
Rowe v. Whatcom County Ry. & Light Co., 44 Wash. 658, 87 P. 921 (1906)—33.02
Roy v. Cunningham, 46 Wash. App. 409, 731 P.2d 526 (Div. 3 1986)—352.04
R. S. Bennett & Co., Inc. v. Economy Mechanical Industries, Inc., 606 F.2d 182, 27 U.C.C. Rep. Serv. 345 (7th Cir. 1979)—301A.01
Ruff v. County of King, 125 Wash. 2d 697, 887 P.2d 886 (1995)—140.01
Ruffer v. St. Frances Cabrini Hosp. of Seattle, 56 Wash. App. 625, 784 P.2d 1288 (Div. 1 1990)—105.04
Ruggiero v. Krzeminski, 928 F.2d 558 (2d Cir. 1991)—342.04
Ruiz-Guzman v. Amvac Chemical Corp., 141 Wash. 2d 493, 7 P.3d 795 (2000)—110.02, 110.02.01, 110.03
Russell v. City of Grandview, 39 Wash. 2d 551, 236 P.2d 1061 (1951)—140.02
Rutger v. Walken, 19 Wash. 2d 681, 143 P.2d 866 (1943)—70.02
Rutherford Food Corp. v. McComb, 331 U.S. 722, 67 S. Ct. 1473, 91 L. Ed. 1772 (1947)—330.91
Rutledge v. Arizona Bd. of Regents, 859 F.2d 732 (9th Cir. 1988)—340.00
Ryder's Estate v. Kelly-Springfield Tire Co., 91 Wash. 2d 111, 587 P.2d 160, 16 A.L.R.4th 129 (1978)—110.01

S

Sacramento, County of v. Lewis, 523 U.S. 833, 118 S. Ct. 1708, 140 L. Ed. 2d 1043 (1998)—342.03
Sacred Heart Medical Center v. Carrado, 92 Wash. 2d 631, 600 P.2d 1015 (1979)—155.13
Sadler v. Wagner, 5 Wash. App. 77, 486 P.2d 330 (Div. 2 1971)—34.02
Safeco Ins. Co. of America v. Butler, 118 Wash. 2d 383, 823 P.2d 499 (1992)—320.00, 320.01, 320.01.01, 320.03, 320.05
Safeco Ins. Co. of America v. JMG Restaurants, Inc., 37 Wash. App. 1, 680 P.2d 409 (Div. 1 1984)—320.02
Safeway, Inc. v. Martin, 76 Wash. App. 329, 885 P.2d 842 (Div. 2 1994)—15.01
Sage v. Northern Pac. Ry. Co., 62 Wash. 2d 6, 380 P.2d 856 (1963)—10.01, 12.09
Saint Francis College v. Al-Khazraji, 481 U.S. 604, 107 S. Ct. 2022, 95 L. Ed. 2d 582, 38 Ed. Law Rep. 1165 (1987)—330.00
Saldivar v. Momah, 145 Wash. App. 365, 186 P.3d 1117 (Div. 2 2008)—2.10, 14.03.02
Sales v. Grant, 158 F.3d 768 (4th Cir. 1998)—340.04
Salois v. Mutual of Omaha Ins. Co., 90 Wash. 2d 355, 581 P.2d 1349 (1978)—320.00

Sambasivan v. Kadlec Medical Center, 184 Wash. App. 567, 338 P.3d 860 (Div. 3 2014)—330.00
Samuelson v. Freeman, 75 Wash. 2d 894, 454 P.2d 406 (1969)—12.06
Sanchez v. Haddix, 95 Wash. 2d 593, 627 P.2d 1312 (1981)—70.02.02
Sandberg v. Spoelstra, 46 Wash. 2d 776, 285 P.2d 564 (1955)—12.02
San Diego, Cal., City of v. Roe, 543 U.S. 77, 125 S. Ct. 521, 160 L. Ed. 2d 410 (2004)—340.06
Sandoval v. Las Vegas Metropolitan Police Dept., 756 F.3d 1154 (9th Cir. 2014)—341.02
SAS America, Inc. v. Inada, 71 Wash. App. 261, 857 P.2d 1047 (Div. 1 1993)—301.05
Sauls v. Scheppler, 57 Wash. 2d 273, 356 P.2d 714, 85 A.L.R.2d 506 (1960)—6.05
Schaaf v. Highfield, 127 Wash. 2d 17, 896 P.2d 665 (1995)—165.01, 165.03, 165.03.01
Schibel v. Eymann, 189 Wash. 2d 93, 399 P.3d 1129 (2017)—107.10
Schmerer v. Darcy, 80 Wash. App. 499, 910 P.2d 498 (Div. 3 1996)—352.03, 352.04
Schmidt v. Coogan, 181 Wash. 2d 661, 335 P.3d 424 (2014)—107.06, 107.08, 107.11
Schmidt v. Cornerstone Investments, Inc., 115 Wash. 2d 148, 795 P.2d 1143 (1990)—14.02, 310.07
Schnall v. AT & T Wireless Services, Inc., 171 Wash. 2d 260, 259 P.3d 129 (2011)—15.01, 310.07
Schnebly v. Bryson, 158 Wash. 250, 290 P. 849 (1930)—72.05
Schneckloth v. Bustamonte, 412 U.S. 218, 93 S. Ct. 2041, 36 L. Ed. 2d 854 (1973)—342.06
Schneider v. City of Seattle, 24 Wash. App. 251, 600 P.2d 666 (Div. 1 1979)—120.04
Schneider v. Strifert, 77 Wash. App. 58, 888 P.2d 1244 (Div. 3 1995)—60.04
Schneider v. Yakima County, 65 Wash. 2d 352, 397 P.2d 411 (1964)—140.01
Schock v. Ringling Bros. and Barnum & Bailey Combined Shows, 5 Wash. 2d 599, 105 P.2d 838 (1940)—120.04
Schoening v. Grays Harbor Community Hosp., 40 Wash. App. 331, 698 P.2d 593 (Div. 2 1985)—105.02.02
Schonauer v. DCR Entertainment, Inc., 79 Wash. App. 808, 905 P.2d 392 (Div. 2 1995)—330.22, 330.23
Schooley v. Pinch's Deli Market, Inc., 134 Wash. 2d 468, 951 P.2d 749 (1998)—15.01, 15.05, 60.03, 370.07, 370.09, 370.11, 370.12
Scott v. Harris, 550 U.S. 372, 127 S. Ct. 1769, 167 L. Ed. 2d 686 (2007)—342.03
Scott v. Petett, 63 Wash. App. 50, 816 P.2d 1229 (Div. 1 1991)—302.10
Scott By and Through Scott v. Pacific West Mountain Resort, 119 Wash. 2d 484, 834 P.2d 6 (1992)—13.00, 13.01, 13.02, 13.03, 13.04
Scrivener v. Clark College, 181 Wash. 2d 439, 334 P.3d 541, 308 Ed. Law Rep. 1132 (2014)—330.01, 330.01.01

Scymanski v. Dufault, 80 Wash. 2d 77, 491 P.2d 1050 (1971)—352.01, 352.02
Sdorra v. Dickinson, 80 Wash. App. 695, 910 P.2d 1328 (Div. 2 1996)—11.01
Sea-Pac Co., Inc. v. United Food and Commercial Workers Local Union 44, 103 Wash. 2d 800, 699 P.2d 217 (1985)—352.01, 352.02
Sears, Roebuck & Co. v. Grant, 49 Wash. 2d 123, 298 P.2d 497 (1956)—303.06
SeaTac, City of v. Cassan, 93 Wash. App. 357, 967 P.2d 1274 (Div. 1 1998)—150.06
Seattle-First Nat. Bank v. Tabert, 86 Wash. 2d 145, 542 P.2d 774 (1975)—110.01, 110.02, 110.02.02, 110.03, 110.10
Seattle, City of v. Erickson, 188 Wash. 2d 721, 398 P.3d 1124 (2017)—1.01, 360.01, 365.01, 365.30
Seattle, City of v. McCoy, 101 Wash. App. 815, 4 P.3d 159 (Div. 1 2000)—380.04
Seattle, Port of v. Blatz, 59 Wash. 2d 55, 365 P.2d 779 (1961)—151.13
Seattle, Port of v. Equitable Capital Group, Inc., 127 Wash. 2d 202, 898 P.2d 275 (1995)—150.05
Seattle & M.R. Co. v. Roeder, 30 Wash. 244, 70 P. 498 (1902)—150.05, 151.05
Seattle & M. Ry. Co. v. Murphine, 4 Wash. 448, 30 P. 720 (1892)—151.08
Seattle First Nat. Bank v. State, 14 Wash. App. 166, 540 P.2d 443 (Div. 2 1975)—120.04
Seattle First Nat. Bank, N.A. v. Siebol, 64 Wash. App. 401, 824 P.2d 1252 (Div. 3 1992)—303.02
Seattle Mattress & Upholstery Co. v. City of Seattle, 134 Wash. 476, 236 P. 84 (1925)—151.08
Seattle, P.A. & L.C. Ry. v. Land, 81 Wash. 206, 142 P. 680 (1914)—151.10
Seattle Times Co. v. Ishikawa, 97 Wash. 2d 30, 640 P.2d 716 (1982)—1.01, 360.01, 365.01, 365.30
Seattle Western Industries, Inc. v. David A. Mowat Co., 110 Wash. 2d 1, 750 P.2d 245 (1988)—105.07
Seay v. Chrysler Corp., 93 Wash. 2d 319, 609 P.2d 1382, 9 A.L.R.4th 625 (1980)—110.10
Sehlin v. Chicago, Milwaukee, St. Paul and Pacific R. Co., 38 Wash. App. 125, 686 P.2d 492 (Div. 3 1984)—12.02
Seling v. Young, 531 U.S. 250, 121 S. Ct. 727, 148 L. Ed. 2d 734 (2001)—365.00, 365.11
Selover v. Aetna Life Ins. Co., 180 Wash. 236, 38 P.2d 1059 (1934)—24.03
Sepulveda-Esquivel v. Central Machine Works, Inc., 120 Wash. App. 12, 84 P.3d 895 (Div. 2 2004)—110.04
Seymour v. Jaffe, 78 Wash. 1, 138 P. 276 (1914)—303.01
Shaare Tefila Congregation v. Cobb, 481 U.S. 615, 107 S. Ct. 2019, 95 L. Ed. 2d 594 (1987)—330.00

Shadbolt v. Department of Labor and Industries of Washington, 121 Wash. 409, 209 P. 683 (1922)—155.20
Shah v. Allstate Ins. Co., 130 Wash. App. 74, 121 P.3d 1204 (Div. 1 2005)—310.07
Shanks v. Oregon-Washington R. & Nav. Co., 98 Wash. 509, 167 P. 1074 (1917)—1.07
Shannon v. Pay 'N Save Corp., 104 Wash. 2d 722, 709 P.2d 799 (1985)—330.02, 330.03
Sharbono v. Universal Underwriters Ins. Co., 139 Wash. App. 383, 161 P.3d 406 (Div. 2 2007)—310.07, 320.02
Sharpe v. American Tel. & Tel. Co., 66 F.3d 1045 (9th Cir. 1995)—330.34, 330.36
Shasky v. Burden, 78 Wash. 2d 193, 470 P.2d 544 (1970)—70.03.01
Shaw v. Housing Authority of City of Walla Walla, 75 Wash. App. 755, 880 P.2d 1006 (Div. 3 1994)—301A.01
Shay v. Parkhurst, 38 Wash. 2d 341, 229 P.2d 510 (1951)—100.08
Sheikh v. Choe, 156 Wash. 2d 441, 128 P.3d 574 (2006)—11.01
Shelby v. Keck, 85 Wash. 2d 911, 541 P.2d 365 (1975)—370.02
Shelley v. United Air Lines, Inc., 84 Wash. App. 129, 925 P.2d 991 (Div. 1 1996)—100.08, 100.09
Shelton v. Azar, Inc., 90 Wash. App. 923, 954 P.2d 352 (Div. 1 1998)—41.04
Sherman v. Lunsford, 44 Wash. App. 858, 723 P.2d 1176 (Div. 1 1986)—302.04, 302.07
Sherman v. City of Seattle, 57 Wash. 2d 233, 356 P.2d 316 (1960)—30.08.01, 120.04
Sherry v. Diercks, 29 Wash. App. 433, 628 P.2d 1336 (Div. 1 1981)—107.07
Shields v. Garrison, 91 Wash. App. 381, 957 P.2d 805 (Div. 2 1998)—150.06.01, 151.07
Shields v. Sta-Fit, Inc., 79 Wash. App. 584, 903 P.2d 525 (Div. 3 1995)—13.04
Shielee v. Hill, 47 Wash. 2d 362, 287 P.2d 479 (1955)—100.02
Shoemake v. Ferrer, 143 Wash. App. 819, 182 P.3d 992 (Div. 1 2008)—107.00, 107.08
Shoemake ex rel. Guardian v. Ferrer, 168 Wash. 2d 193, 225 P.3d 990 (2010)—107.08
Shoemaker v. St. Joseph Hosp. and Health Care Center, 56 Wash. App. 575, 784 P.2d 562 (Div. 2 1990)—14.03
Shorter v. Drury, 103 Wash. 2d 645, 695 P.2d 116 (1985)—13.00, 13.03, 13.04
Shows v. Pemberton, 73 Wash. App. 107, 868 P.2d 164 (Div. 3 1994)—320.03
Sigurdson v. City of Seattle, 48 Wash. 2d 155, 292 P.2d 214 (1956)—2.10
Sikking v. National R.R. Passenger Corp., 52 Wash. App. 246, 758 P.2d 1003 (Div. 2 1988)—120.02

Silverdale Hotel Associates v. Lomas & Nettleton Co., 36 Wash. App. 762, 677 P.2d 773 (Div. 2 1984)—303.05
Silves v. King, 93 Wash. App. 873, 970 P.2d 790, 79 A.L.R.5th 771 (Div. 1 1999)—105.02.01, 105.04
Simburg, Ketter, Sheppard & Purdy, LLP v. Olshan, 109 Wash. App. 436, 33 P.3d 742 (Div. 1 2000)—107.00
Simonetta v. Viad Corp., 165 Wash. 2d 341, 197 P.3d 127 (2008)—110.04
Simonson v. Fendell, 101 Wash. 2d 88, 675 P.2d 1218 (1984)—301.08
Simpson v. Doe, 39 Wash. 2d 934, 239 P.2d 1051 (1952)—12.06
Simpson Timber Co. v. Wentworth, 96 Wash. App. 731, 981 P.2d 878 (Div. 2 1999)—155.20
Sing v. John L. Scott, Inc., 134 Wash. 2d 24, 948 P.2d 816 (1997)—310.08
Singer Credit Corp. v. Mercer Island Masonry, Inc., 13 Wash. App. 877, 538 P.2d 544 (Div. 1 1975)—302.07
Singh v. Edwards Lifesciences Corp., 151 Wash. App. 137, 210 P.3d 337 (Div. 1 2009)—110.00
Singleton v. Jackson, 85 Wash. App. 835, 935 P.2d 644 (Div. 2 1997)—120.01, 120.08
Sintra, Inc. v. City of Seattle, 131 Wash. 2d 640, 935 P.2d 555 (1997)—35.01, 340.06, 348.02
Sintra, Inc. v. City of Seattle, 119 Wash. 2d 1, 829 P.2d 765 (1992)—340.00, 340.01, 340.02, 352.03
Sjogren v. Properties of Pacific Northwest, LLC, 118 Wash. App. 144, 75 P.3d 592 (Div. 2 2003)—130.01, 130.02, 130.05, 130.06
Skaggs v. General Elec. Co., 52 Wash. 2d 787, 328 P.2d 871 (1958)—140.02
Skeels v. Davidson, 18 Wash. 2d 358, 139 P.2d 301, 149 A.L.R. 225 (1943)—31.06.01
Skeie v. Mercer Trucking Co., Inc., 115 Wash. App. 144, 61 P.3d 1207 (Div. 3 2003)—110.02.02
Slack v. Luke, 192 Wash. App. 909, 370 P.3d 49 (Div. 3 2016)—107.04
Smale v. Cellco Partnership, 547 F. Supp. 2d 1181 (W.D. Wash. 2008)—310.08
Smiddy v. Varney, 665 F.2d 261 (9th Cir. 1981)—340.01
Smith v. Acme Paving Co., 16 Wash. App. 389, 558 P.2d 811 (Div. 2 1976)—140.01.01
Smith v. B & I Sales Co., 74 Wash. 2d 151, 443 P.2d 819 (1968)—12.06
Smith v. Dart, 803 F.3d 304 (7th Cir. 2015)—343.00
Smith v. King, 106 Wash. 2d 443, 722 P.2d 796 (1986)—33.03
Smith v. Manning's, Inc., 13 Wash. 2d 573, 126 P.2d 44 (1942)—12.06, 120.06.02
Smith v. Safeco Ins. Co., 150 Wash. 2d 478, 78 P.3d 1274 (2003)—320.02
Smith v. Safeco Ins. Co., 112 Wash. App. 645, 50 P.3d 277 (Div. 2 2002)—320.05

Smith v. Shannon, 100 Wash. 2d 26, 666 P.2d 351 (1983)—105.04, 105.05
Smith v. Wade, 461 U.S. 30, 103 S. Ct. 1625, 75 L. Ed. 2d 632 (1983)—348.02
Smithrock Quarry, Inc. v. State, 60 Wash. 2d 387, 374 P.2d 168 (1962)—151.05
Snap-On Tools Corp. v. Roberts, 35 Wash. App. 32, 665 P.2d 417 (Div. 3 1983)—301.09
Sneed v. Barna, 80 Wash. App. 843, 912 P.2d 1035 (Div. 2 1996)—330.52
Snow v. Whitney Fidalgo Seafoods, Inc., 38 Wash. App. 220, 686 P.2d 1090 (Div. 1 1984)—34.02
Snyder v. Medical Service Corp. of Eastern Washington, 145 Wash. 2d 233, 35 P.3d 1158 (2001)—330.34
Sofie v. Fibreboard Corp., 112 Wash. 2d 636, 771 P.2d 711 (1989)—30.00, 45.20, 45.21
Sokol & Associates, Inc. v. Techsonic Industries, Inc., 495 F.3d 605 (8th Cir. 2007)—301.07
Songstad v. Municipality of Metropolitan Seattle, 2 Wash. App. 680, 472 P.2d 574 (Div. 2 1970)—150.06.02
Soproni v. Polygon Apartment Partners, 137 Wash. 2d 319, 971 P.2d 500 (1999)—110.01, 110.02
Soranno's Gasco, Inc. v. Morgan, 874 F.2d 1310 (9th Cir. 1989)—340.01
Sorensen v. McDonald's Estate, 78 Wash. 2d 103, 470 P.2d 206 (1970)—14.02
Sorrel v. Eagle Healthcare, Inc., 110 Wash. App. 290, 38 P.3d 1024 (Div. 1 2002)—303.01, 310.06
Spivey v. City of Bellevue, 187 Wash. 2d 716, 389 P.3d 504 (2017)—310.07
Spokane, City of v. Williams, 157 Wash. 120, 288 P. 258 (1930)—150.05
Spokane Concrete Products, Inc., In re, 126 Wash. 2d 269, 892 P.2d 98 (1995)—50.18
Spokane Traction Co. v. Granath, 42 Wash. 506, 85 P. 261 (1906)—150.07.01
Sposari v. Matt Malaspina & Co., 63 Wash. 2d 679, 388 P.2d 970 (1964)—303.04
Spottiswoode v. Levine, 1999 ME 79, 730 A.2d 166 (Me. 1999)—351.05, 351.08
Sprague v. Snug Harbor Marina, Inc., 13 Wash. App. 246, 534 P.2d 583 (Div. 1 1975)—24.03
Spring v. Department of Labor and Industries of State, 96 Wash. 2d 914, 640 P.2d 1 (1982)—155.07, 155.07.01
Spurrell v. Bloch, 40 Wash. App. 854, 701 P.2d 529, 25 Ed. Law Rep. 956 (Div. 2 1985)—14.03.02
S.S. v. Alexander, 143 Wash. App. 75, 177 P.3d 724, 229 Ed. Law Rep. 899 (Div. 1 2008)—340.00
Staats v. Brown, 139 Wash. 2d 757, 991 P.2d 615 (2000)—342.01, 342.04, 342.05

Stangland v. Brock, 109 Wash. 2d 675, 747 P.2d 464 (1987)—107.04, 107.06
Stanley v. Allen, 27 Wash. 2d 770, 180 P.2d 90 (1947)—6.13.01
Stansfield v. Douglas County, 107 Wash. App. 1, 27 P.3d 205 (Div. 3 2001)—50.01
Starr v. Baca, 652 F.3d 1202 (9th Cir. 2011)—340.06
Starr v. County of Los Angeles, 659 F.3d 850 (9th Cir. 2011)—340.06
State v. Acrey, 148 Wash. 2d 738, 64 P.3d 594 (2003)—342.04
State v. Amunsis, 61 Wash. 2d 160, 377 P.2d 462 (1963)—150.04
State v. A.N.W. Seed Corp., 116 Wash. 2d 39, 802 P.2d 1353 (1991)—310.01
State v. Arndt, 87 Wash. 2d 374, 553 P.2d 1328 (1976)—365.00, 365.31
State v. Ashcraft, 71 Wash. App. 444, 859 P.2d 60 (Div. 1 1993)—6.17
State v. Badda, 68 Wash. 2d 50, 411 P.2d 411 (1966)—6.13.01
State v. Baird, 187 Wash. 2d 210, 386 P.3d 239 (2016)—342.05
State v. Baker, 56 Wash. 2d 846, 355 P.2d 806 (1960)—5.01
State v. Barber, 38 Wash. App. 758, 689 P.2d 1099 (Div. 1 1984)—1.06
State v. Barry, 179 Wash. App. 175, 317 P.3d 528 (Div. 2 2014)—360.02
State v. Basin Development & Sales Co., 53 Wash. 2d 201, 332 P.2d 245 (1958)—150.13
State v. Bennett, 161 Wash. 2d 303, 165 P.3d 1241 (2007)—365.11
State v. Bessette, 105 Wash. App. 793, 21 P.3d 318 (Div. 3 2001)—342.07
State v. Bone-Club, 128 Wash. 2d 254, 906 P.2d 325 (1995)—1.01, 360.01, 365.01, 365.30
State v. Boogaard, 90 Wash. 2d 733, 585 P.2d 789 (1978)—1.12, 6.14
State v. Bourgeois, 133 Wash. 2d 389, 945 P.2d 1120 (1997)—1.08
State v. Brock, 184 Wash. 2d 148, 355 P.3d 1118 (2015)—342.05
State v. Brown, 92 Wash. App. 586, 965 P.2d 1102 (Div. 2 1998)—302.04
State v. Brown, 111 Wash. 2d 124, 761 P.2d 588 (1988)—3.02
State v. Buckley, 18 Wash. App. 798, 572 P.2d 730 (Div. 1 1977)—150.05
State v. Byrd, 178 Wash. 2d 611, 310 P.3d 793 (2013)—342.05
State v. Caliguri, 99 Wash. 2d 501, 664 P.2d 466 (1983)—6.19
State v. Calkins, 50 Wash. 2d 716, 314 P.2d 449 (1957)—150.10, 151.01, 151.04
State v. Cardenas, 146 Wash. 2d 400, 47 P.3d 127 (2002)—342.07
State v. Carner, 28 Wash. App. 439, 624 P.2d 204 (Div. 2 1981)—342.05
State v. Carroll, 119 Wash. 623, 206 P. 563 (1922)—1.08
State v. Castellanos, 132 Wash. 2d 94, 935 P.2d 1353 (1997)—1.02
State v. Corn, 95 Wash. App. 41, 975 P.2d 520 (Div. 3 1999)—6.13.01
State v. Cottrell, 12 Wash. App. 640, 532 P.2d 644 (Div. 3 1975)—342.04
State v. Cuzick, 11 Wash. App. 539, 524 P.2d 457 (Div. 2 1974)—6.17, 6.17.01
State v. Dana, 73 Wash. 2d 533, 439 P.2d 403 (1968)—12.01
State v. Davis, 141 Wash. 2d 798, 10 P.3d 977 (2000)—1.01, 360.01, 365.01, 365.30

State v. Day, 161 Wash. 2d 889, 168 P.3d 1265 (2007)—342.10
State v. Doughty, 170 Wash. 2d 57, 239 P.3d 573 (2010)—342.10
State v. Duncan, 146 Wash. 2d 166, 43 P.3d 513 (2002)—342.10
State v. Dykstra, 33 Wash. App. 648, 656 P.2d 1137 (Div. 2 1983)—6.14
State v. Edwards, 15 Wash. App. 848, 552 P.2d 1095 (Div. 2 1976)—6.14
State v. Elder, 70 Wash. 2d 414, 423 P.2d 533 (1967)—150.02, 150.03, 150.09, 151.12
State v. Ellard, 46 Wash. App. 242, 730 P.2d 109 (Div. 2 1986)—6.07
State v. Elmore, 139 Wash. 2d 250, 985 P.2d 289 (1999)—1.02
State v. Evans, 96 Wash. 2d 119, 634 P.2d 845 (1981)—150.11
State v. Ferrier, 136 Wash. 2d 103, 960 P.2d 927 (1998)—342.06
State v. Fox, 53 Wash. 2d 216, 332 P.2d 943 (1958)—150.06, 151.01, 151.02, 151.03, 151.04
State v. French, 88 Wash. App. 586, 945 P.2d 752 (Div. 2 1997)—50.02.01
State v. Garcia, 2009-NMSC-046, 147 N.M. 134, 217 P.3d 1032 (2009)—342.03
State v. Gatewood, 163 Wash. 2d 534, 182 P.3d 426 (2008)—342.10
State v. Giedd, 43 Wash. App. 787, 719 P.2d 946 (Div. 1 1986)—15.01
State v. Gilliam, 146 Wash. 6, 262 P. 138 (1927)—150.07
State v. Goble, 88 Wash. App. 503, 945 P.2d 263 (Div. 2 1997)—342.04
State v. Grant, 156 Wash. 96, 286 P. 63 (1930)—380.02
State v. Gray, 64 Wash. 2d 979, 395 P.2d 490 (1964)—6.05
State v. Green, 90 Wash. 2d 52, 578 P.2d 855 (1978)—150.07, 150.07.01
State v. Gunwall, 106 Wash. 2d 54, 720 P.2d 808, 76 A.L.R.4th 517 (1986)—340.00
State v. Hansen, 122 Wash. 2d 712, 862 P.2d 117 (1993)—107.01
State v. Hansen, 15 Wash. App. 95, 546 P.2d 1242 (Div. 1 1976)—16.04, 16.04.01
State v. Harrell, 83 Wash. App. 393, 923 P.2d 698 (Div. 1 1996)—342.05
State v. Hayward, 152 Wash. App. 632, 217 P.3d 354 (Div. 2 2009)—0.10
State v. Hehman, 90 Wash. 2d 45, 578 P.2d 527 (1978)—342.05
State v. Higgins, 75 Wash. 2d 110, 449 P.2d 393 (1969)—150.05
State v. Hobart, 5 Wash. App. 469, 487 P.2d 635 (Div. 3 1971)—150.02, 150.06, 150.09, 151.05, 151.13
State v. Hobbs, 71 Wash. App. 419, 859 P.2d 73 (Div. 1 1993)—6.13.01
State v. Hoisington, 123 Wash. App. 138, 94 P.3d 318 (Div. 3 2004)—365.10, 365.14
State v. Holzknecht, 157 Wash. App. 754, 238 P.3d 1233 (Div. 1 2010)—0.10
State v. Hopkins, 113 Wash. App. 954, 55 P.3d 691 (Div. 3 2002)—342.05
State v. Howerton, 187 Wash. App. 357, 348 P.3d 781 (Div. 1 2015)—342.10
State v. Hunsaker, 74 Wash. App. 209, 873 P.2d 546 (Div. 1 1994)—6.14
State v. Hurd, 5 Wash. 2d 308, 105 P.2d 59 (1940)—16.04, 16.04.01

State v. Jones, 97 Wash. 2d 159, 641 P.2d 708 (1982)—6.14
State v. Kaiser, 161 Wash. App. 705, 254 P.3d 850 (Div. 1 2011)—310.08
State v. Kelley, 108 Wash. 245, 182 P. 942 (1919)—150.06, 150.07.01
State v. Khounvichai, 149 Wash. 2d 557, 69 P.3d 862 (2003)—342.06
State v. Kilburn, 151 Wash. 2d 36, 84 P.3d 1215 (2004)—360.05
State v. Kirkpatrick, 14 Wash. App. 212, 540 P.2d 450 (Div. 2 1975)—12.01
State v. Kodama, 4 Wash. App. 676, 483 P.2d 857 (Div. 1 1971)—151.01, 151.04
State v. Koontz, 145 Wash. 2d 650, 41 P.3d 475 (2002)—6.19
State v. Kruger, 77 Wash. 2d 105, 459 P.2d 648 (1969)—151.15
State v. Larson, 54 Wash. 2d 86, 338 P.2d 135 (1959)—150.15, 151.05, 151.10, 151.14
State v. Lee, 77 Wash. App. 119, 889 P.2d 944 (Div. 3 1995)—1.12
State v. Legas, 20 Wash. App. 535, 581 P.2d 172 (Div. 3 1978)—342.04
State v. Lewellyn, 78 Wash. App. 788, 895 P.2d 418 (Div. 3 1995)—16.04, 16.04.01
State v. Lewis, 37 Wash. 2d 540, 225 P.2d 428 (1950)—1.08
State v. Linehan, 147 Wash. 2d 638, 56 P.3d 542 (2002)—365.31
State v. Lord, 117 Wash. 2d 829, 822 P.2d 177 (1991)—1.02, 6.06
State v. MacDicken, 179 Wash. 2d 936, 319 P.3d 31 (2014)—342.05
State v. Mandatory Poster Agency, Inc., 199 Wash. App. 506, 398 P.3d 1271 (Div. 1 2017)—310.01, 310.08
State v. McCuistion, 174 Wash. 2d 369, 275 P.3d 1092, 78 A.L.R.6th 747 (2012)—365.00
State v. McCuistion, 169 Wash. 2d 633, 238 P.3d 1147 (2010)—365.00
State v. McCullum, 28 Wash. App. 145, 622 P.2d 873 (Div. 1 1981)—6.14
State v. McDonald, 98 Wash. 2d 521, 656 P.2d 1043 (1983)—150.06, 151.05
State v. McHenry, 88 Wash. 2d 211, 558 P.2d 188 (1977)—365.11
State v. McKinnon, 88 Wash. 2d 75, 558 P.2d 781 (1977)—342.04
State v. McVeigh, 35 Wash. 2d 493, 214 P.2d 165 (1950)—2.14, 6.03
State v. Mills, 116 Wash. App. 106, 64 P.3d 1253 (Div. 1 2003)—0.10
State v. Monday, 171 Wash. 2d 667, 257 P.3d 551 (2011)—1.01, 360.01, 365.01, 365.30
State v. Monroe, 107 Wash. App. 637, 27 P.3d 1249 (Div. 1 2001)—6.19
State v. Motor Freight Terminals, Inc., 57 Wash. 2d 442, 357 P.2d 861 (1960)—151.15
State v. Mottman Mercantile Co., 51 Wash. 2d 722, 321 P.2d 912 (1958)—150.11, 151.05, 151.10
State v. Nelson, 63 Wash. 2d 188, 386 P.2d 142 (1963)—5.01
State v. Obie Outdoor Advertising, Inc., 9 Wash. App. 943, 516 P.2d 233, 73 A.L.R.3d 1114 (Div. 3 1973)—151.05, 151.07
State v. Paul Bunyan Rifle and Sportsman's Club, Inc., 132 Wash. App. 85, 130 P.3d 414 (Div. 2 2006)—150.06
State v. Person, 56 Wash. 2d 283, 352 P.2d 189, 81 A.L.R.2d 1088 (1960)—70.02.03

State v. Pulfrey, 154 Wash. 2d 517, 111 P.3d 1162 (2005)—342.08, 342.09
State v. Radcliffe, 139 Wash. App. 214, 159 P.3d 486 (Div. 2 2007)—340.00
State v. Ralph Williams' North West Chrysler Plymouth, Inc., 87 Wash. 2d 298, 553 P.2d 423 (1976)—310.08
State v. Ramirez, 49 Wash. App. 814, 746 P.2d 344 (Div. 3 1987)—342.07
State v. Ratliff, 46 Wash. App. 325, 730 P.2d 716 (Div. 1 1986)—30.13
State v. Reding, 119 Wash. 2d 685, 835 P.2d 1019 (1992)—342.08, 342.09
State v. Reichenbach, 153 Wash. 2d 126, 101 P.3d 80 (2004)—107.00
State v. Robinson, 171 Wash. 2d 292, 253 P.3d 84 (2011)—342.05
State v. Robinson, 84 Wash. 2d 42, 523 P.2d 1192 (1974)—1.08
State v. Robinson, 9 Wash. App. 644, 513 P.2d 837 (Div. 1 1973)—1.08, 6.14
State v. Rogers, 70 Wash. App. 626, 855 P.2d 294 (Div. 2 1993)—6.05
State v. Roth, 78 Wash. 2d 711, 479 P.2d 55 (1971)—150.05
State v. Rowley, 74 Wash. 2d 328, 444 P.2d 695 (1968)—150.08, 150.09, 150.10, 151.05
State v. Russell, 25 Wash. App. 933, 611 P.2d 1320 (Div. 1 1980)—1.08
State v. Saraceno, 23 Wash. App. 473, 596 P.2d 297 (Div. 3 1979)—1.08
State v. Sherrill, 13 Wash. App. 250, 534 P.2d 598 (Div. 1 1975)—151.15
State v. Shoemaker, 85 Wash. 2d 207, 533 P.2d 123 (1975)—342.06
State v. Slert, 181 Wash. 2d 598, 334 P.3d 1088 (2014)—1.01, 360.01, 365.01, 365.30
State v. Slert, 169 Wash. App. 766, 282 P.3d 101 (Div. 2 2012)—1.01, 360.01, 365.01, 365.30
State v. Smith, 119 Wash. 2d 675, 835 P.2d 1025 (1992)—342.05
State v. Smith, 43 Wash. 2d 307, 261 P.2d 109 (1953)—1.08
State v. Souther, 100 Wash. App. 701, 998 P.2d 350 (Div. 1 2000)—70.02.06
State v. Spencer, 90 Wash. 2d 415, 583 P.2d 1201 (1978)—150.05
State v. Stockmyer, 83 Wash. App. 77, 920 P.2d 1201 (Div. 2 1996)—6.05
State v. Strode, 167 Wash. 2d 222, 217 P.3d 310 (2009)—1.01, 360.01, 365.01, 365.30
State v. Swarva, 86 Wash. 2d 29, 541 P.2d 982 (1975)—151.11
State v. Templeman, 39 Wash. App. 218, 693 P.2d 125 (Div. 3 1984)—150.04, 150.07, 150.07.01
State v. Terrovona, 105 Wash. 2d 632, 716 P.2d 295 (1986)—342.07
State v. Thein, 138 Wash. 2d 133, 977 P.2d 582 (1999)—342.04
State v. Tigano, 63 Wash. App. 336, 818 P.2d 1369 (Div. 2 1991)—1.01, 360.01
State v. Trask, 91 Wash. App. 253, 957 P.2d 781 (Div. 2 1998)—302.02, 302.11
State v. Tumwater Lumber Mills Co., 194 Wash. 411, 78 P.2d 160 (1938)—150.09

State v. Valdez, 167 Wash. 2d 761, 224 P.3d 751 (2009)—342.05
State v. Walker, 157 Wash. 2d 307, 138 P.3d 113 (2006)—342.05
State v. Walker, 136 Wash. 2d 678, 965 P.2d 1079 (1998)—342.06
State v. Wandermere Co., 89 Wash. App. 369, 949 P.2d 392 (Div. 3 1997)—150.06, 151.05
State v. Ward, 41 Wash. 2d 794, 252 P.2d 279 (1953)—150.13, 151.02
State v. Washington Horse Breeders Ass'n, 64 Wash. 2d 756, 394 P.2d 218 (1964)—150.04
State v. Watkins, 99 Wash. 2d 166, 660 P.2d 1117 (1983)—1.12, 6.14
State v. Werth, 18 Wash. App. 530, 571 P.2d 941 (Div. 1 1977)—342.04
State v. Williams, 68 Wash. 2d 946, 416 P.2d 350 (1966)—150.05, 150.11, 150.12
State v. Williams, 64 Wash. 2d 842, 394 P.2d 693 (1964)—151.01, 151.02
State v. Wilson, 6 Wash. App. 443, 493 P.2d 1252 (Div. 2 1972)—150.08, 151.06, 151.07
State v. Young, 123 Wash. 2d 173, 867 P.2d 593 (1994)—342.04
State v. Zamora, 6 Wash. App. 130, 491 P.2d 1342 (Div. 1 1971)—370.02
State Farm Fire and Cas. Co. v. Huynh, 92 Wash. App. 454, 962 P.2d 854 (Div. 1 1998)—6.08.01, 160.02
State Farm Mut. Auto. Ins. Co. v. Campbell, 538 U.S. 408, 123 S. Ct. 1513, 155 L. Ed. 2d 585, 60 Fed. R. Evid. Serv. 1349, 1 A.L.R. Fed. 2d 739 (2003)—348.02
Staub v. Proctor Hosp., 562 U.S. 411, 131 S. Ct. 1186, 179 L. Ed. 2d 144 (2011)—340.06
Steele v. Lundgren, 85 Wash. App. 845, 935 P.2d 671 (Div. 1 1997)—302.07
Stephens v. Omni Ins. Co., 138 Wash. App. 151, 159 P.3d 10 (Div. 1 2007)—310.02, 310.06
Stevens v. Gordon, 118 Wash. App. 43, 74 P.3d 653 (Div. 3 2003)—15.01
Stewart v. State, 92 Wash. 2d 285, 597 P.2d 101 (1979)—70.03.04
Stewart Title Guar. Co. v. Sterling Sav. Bank, 178 Wash. 2d 561, 311 P.3d 1 (2013)—107.02
Stidham v. State, Dept. of Licensing, 30 Wash. App. 611, 637 P.2d 970 (Div. 2 1981)—352.06
Stiley v. Block, 130 Wash. 2d 486, 925 P.2d 194 (1996)—107.01, 160.01, 160.02
St. Louis, City of v. Praprotnik, 485 U.S. 112, 108 S. Ct. 915, 99 L. Ed. 2d 107, 14 Fed. R. Serv. 3d 412 (1988)—341.01
Stolz v. McKowen, 14 Wash. App. 808, 545 P.2d 584 (Div. 2 1976)—12.02
Stone v. Stone, 76 Wash. 2d 586, 458 P.2d 183 (1969)—24.03
Storti v. University of Washington, 181 Wash. 2d 28, 330 P.3d 159, 306 Ed. Law Rep. 1088 (2014)—301.01
St. Paul Fire and Marine Ins. Co. v. Onvia, Inc., 165 Wash. 2d 122, 196 P.3d 664 (2008)—320.00, 320.01, 320.02, 320.05, 320.06
St. Paul Mercury Ins. Co. v. Salovich, 41 Wash. App. 652, 705 P.2d 812 (Div. 2 1985)—300.02

Strandberg v. Northern Pac. Ry. Co., 59 Wash. 2d 259, 367 P.2d 137 (1961)—12.09
Stratton v. Department of Labor and Industries, 7 Wash. App. 652, 501 P.2d 1072 (Div. 1 1972)—155.02
Stratton v. Department of Labor and Industries, 1 Wash. App. 77, 459 P.2d 651 (Div. 1 1969)—155.02
Strickland v. Deaconess Hosp., 47 Wash. App. 262, 735 P.2d 74 (Div. 3 1987)—14.03
Strode v. Gleason, 9 Wash. App. 13, 510 P.2d 250, 60 A.L.R.3d 924 (Div. 1 1973)—32.06.01
Stuart v. Consolidated Foods Corp., 6 Wash. App. 841, 496 P.2d 527 (Div. 1 1972)—31.02.01
Sulkosky v. Brisebois, 49 Wash. App. 273, 742 P.2d 193 (Div. 2 1987)—70.02.04, 70.03.04
Sullivan v. Seattle Elec. Co., 51 Wash. 71, 97 P. 1109 (1908)—100.08
Sumpter v. National Grocery Co., 194 Wash. 598, 78 P.2d 1087, 116 A.L.R. 1166 (1938)—6.08.01
Suriano v. Sears, Roebuck & Co., 117 Wash. App. 819, 72 P.3d 1097 (Div. 3 2003)—120.06, 120.07
Suter v. Artist M., 503 U.S. 347, 112 S. Ct. 1360, 118 L. Ed. 2d 1 (1992)—340.00
Sutton v. Shufelberger, 31 Wash. App. 579, 643 P.2d 920 (Div. 1 1982)—30.17, 33.01, 330.83
Svehaug v. Donoghue, 5 Wash. App. 817, 490 P.2d 1345 (Div. 1 1971)—70.04
Svendsen v. Stock, 143 Wash. 2d 546, 23 P.3d 455 (2001)—310.08
Swanson v. McKain, 59 Wash. App. 303, 796 P.2d 1291 (Div. 2 1990)—120.02.01
Sweek v. Municipality of Metropolitan Seattle, 45 Wash. App. 479, 726 P.2d 37 (Div. 1 1986)—100.09
Swope v. Sundgren, 73 Wash. 2d 747, 440 P.2d 494 (1968)—0.10
System Tank Lines v. Dixon, 47 Wash. 2d 147, 286 P.2d 704 (1955)—10.01
Szupkay v. Cozzetti, 37 Wash. App. 30, 678 P.2d 358 (Div. 1 1984)—12.02, 70.04, 70.05

T

Tacoma, City of v. State, 4 Wash. 64, 29 P. 847 (1892)—150.00
Tacoma, City of v. Tacoma Light & Water Co., 17 Wash. 458, 50 P. 55 (1897)—150.08, 151.05
Tacoma, City of v. Taxpayers of Tacoma, 49 Wash. 2d 781, 307 P.2d 567 (1957)—150.07
Taft v. Washington Mut. Sav. Bank, 127 Wash. 503, 221 P. 604 (1923)—151.01
Taggart v. State, 118 Wash. 2d 195, 822 P.2d 243 (1992)—15.01
Tait v. Wahl, 97 Wash. App. 765, 987 P.2d 127 (Div. 1 1999)—31.00, 31.01.01

Talarico by Johnston v. Foremost Ins. Co., 105 Wash. 2d 114, 712 P.2d 294 (1986)—14.01
Talley v. Fournier, 3 Wash. App. 808, 479 P.2d 96 (Div. 2 1970)—2.10
Tamosaitis v. URS Inc., 781 F.3d 468 (9th Cir. 2015)—330.42
Tank v. State Farm Fire & Cas. Co., 105 Wash. 2d 381, 715 P.2d 1133 (1986)—320.00, 320.01, 320.02, 320.03
Tauscher v. Puget Sound Power and Light Co., 96 Wash. 2d 274, 635 P.2d 426 (1981)—12.09
Taylor v. Bell, 185 Wash. App. 270, 340 P.3d 951 (Div. 1 2014)—107.07
Taylor v. Burlington Northern Railroad Holdings, Inc., 2016 A.D. Cas. (BNA) 46677, 2016 WL 632077 (W.D. Wash. 2016)—330.31.01
Taylor v. Intuitive Surgical, Inc., 187 Wash. 2d 743, 389 P.3d 517 (2017)—110.02.01, 110.03
Taylor v. Shigaki, 84 Wash. App. 723, 930 P.2d 340 (Div. 1 1997)—302.02
Taylor v. Stimson, 52 Wash. 2d 278, 324 P.2d 1070 (1958)—130.01
Teagle v. Fischer & Porter Co., 89 Wash. 2d 149, 570 P.2d 438 (1977)—110.03, 110.10
Tecklenburg v. Washington Gas & Elec. Co., 40 Wash. 2d 141, 241 P.2d 1172 (1952)—301.11
Teglo v. Porter, 65 Wash. 2d 772, 399 P.2d 519 (1965)—130.00, 130.01.01
Tegman v. Accident & Medical Investigations, Inc., 150 Wash. 2d 102, 75 P.3d 497 (2003)—11.01, 15.04, 15.05, 41.04, 110.02.04
Tennant v. Roys, 44 Wash. App. 305, 722 P.2d 848 (Div. 1 1986)—12.01
Tennessee v. Garner, 471 U.S. 1, 105 S. Ct. 1694, 85 L. Ed. 2d 1 (1985)—342.01, 342.02, 342.03
Terhune v. A. H. Robins Co., 90 Wash. 2d 9, 577 P.2d 975 (1978)—110.03
Terrell v. Lincoln Motel, Inc., 183 N.J. Super. 55, 443 A.2d 236 (App. Div. 1982)—22.01
Terry v. Ohio, 392 U.S. 1, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968)—342.10
Theonnes v. Hazen, 37 Wash. App. 644, 681 P.2d 1284 (Div. 1 1984)—70.05
Thogerson v. Heiner, 66 Wash. App. 466, 832 P.2d 508 (Div. 2 1992)—30.17
Thola v. Henschell, 140 Wash. App. 70, 164 P.3d 524 (Div. 2 2007)—351.01
Thomas v. Carpenter, 881 F.2d 828 (9th Cir. 1989)—340.02
Thomas v. Cook County Sheriff's Dept., 604 F.3d 293 (7th Cir. 2010)—340.06
Thomas v. Housing Authority of City of Bremerton, 71 Wash. 2d 69, 426 P.2d 836 (1967)—130.01
Thomas v. Wilfac, Inc., 65 Wash. App. 255, 828 P.2d 597 (Div. 3 1992)—105.04
Thompson v. Berta Enterprises, Inc., 72 Wash. App. 531, 864 P.2d 983 (Div. 1 1994)—330.22, 330.23

Thompson v. Everett Clinic, 71 Wash. App. 548, 860 P.2d 1054 (Div. 1 1993)—50.02
Thompson v. Katzer, 86 Wash. App. 280, 936 P.2d 421 (Div. 2 1997)—120.02.01, 120.07, 120.08
Thompson v. King Feed & Nutrition Service, Inc., 153 Wash. 2d 447, 105 P.3d 378 (2005)—30.10, 30.11, 30.12, 30.13
Thompson v. Rockford Mach. Tool Co., 49 Wash. App. 482, 744 P.2d 357, 4 U.C.C. Rep. Serv. 2d 1418 (Div. 3 1987)—110.07
Thompson v. St. Regis Paper Co., 102 Wash. 2d 219, 685 P.2d 1081 (1984)—301A.01, 330.00
Thornton v. Annest, 19 Wash. App. 174, 574 P.2d 1199 (Div. 2 1978)—105.04
Thornton v. Interstate Securities Co., 35 Wash. App. 19, 666 P.2d 370 (Div. 3 1983)—302.09
Tiegs v. Boise Cascade Corp., 83 Wash. App. 411, 922 P.2d 115 (Div. 3 1996)—301.08, 301.09, 380.04
Tiegs v. Watts, 135 Wash. 2d 1, 954 P.2d 877 (1998)—303.04, 380.00, 380.01, 380.04, 380.05
Tiger Oil Corp. v. Yakima County, 158 Wash. App. 553, 242 P.3d 936 (Div. 3 2010)—165.05
Timberline Air Service, Inc. v. Bell Helicopter-Textron, Inc., 125 Wash. 2d 305, 884 P.2d 920 (1994)—110.00, 110.05
Tincani v. Inland Empire Zoological Soc., 124 Wash. 2d 121, 875 P.2d 621, 91 Ed. Law Rep. 1151 (1994)—13.00, 13.01, 13.02, 120.02.01, 120.04, 120.05, 120.06, 120.07, 130.01, 130.02, 130.06
Tincani v. Inland Empire Zoological Soc., 66 Wash. App. 852, 837 P.2d 640 (Div. 3 1992)—13.03
Tinder v. Nordstrom, Inc., 84 Wash. App. 787, 929 P.2d 1209 (Div. 1 1997)—22.01, 100.02
Tinjum v. Atlantic Richfield Co., 109 Wash. App. 203, 34 P.3d 855 (Div. 1 2001)—330.32
Tire Towne, Inc. v. G & L Service Co., 10 Wash. App. 184, 518 P.2d 240 (Div. 2 1973)—24.03
Titus v. Tacoma Smeltermen's Union Local No. 25, 62 Wash. 2d 461, 383 P.2d 504 (1963)—50.02, 50.03, 50.07
TMT Bear Creek Shopping Center, Inc. v. Petco Animal Supplies, Inc., 140 Wash. App. 191, 165 P.3d 1271 (Div. 1 2007)—303.01
Tobias v. Rainwater, 71 Wash. 2d 845, 431 P.2d 156 (1967)—12.02, 70.02, 70.02.06
Tollycraft Yachts Corp. v. McCoy, 122 Wash. 2d 426, 858 P.2d 503 (1993)—11.04
Tomlinson v. Puget Sound Freight Lines, Inc., 140 Wash. App. 845, 166 P.3d 1276 (Div. 2 2007)—155.21
Tondevold v. Blaine School Dist. No. 503, Whatcom County, 91 Wash. 2d 632, 590 P.2d 1268 (1979)—301.07
Tonseth v. Serwold, 22 Wash. 2d 629, 157 P.2d 333 (1945)—301.07
Top Line Builders, Inc. v. Bovenkamp, 179 Wash. App. 794, 320 P.3d 130 (Div. 1 2014)—302.03

Top Service Body Shop, Inc. v. Allstate Ins. Co., 283 Or. 201, 582 P.2d 1365 (1978)—352.03
Torgeson v. Hanford, 79 Wash. 56, 139 P. 648 (1914)—30.07.01
Torisky v. Schweiker, 446 F.3d 438 (3d Cir. 2006)—343.00
Tornetta v. Allstate Ins. Co., 94 Wash. App. 803, 973 P.2d 8 (Div. 1 1999)—320.00
Torno v. Hayek, 133 Wash. App. 244, 135 P.3d 536 (Div. 3 2006)—15.01
Torres-Lopez v. May, 111 F.3d 633 (9th Cir. 1997)—330.91
Torres v. City of Los Angeles, 548 F.3d 1197 (9th Cir. 2008)—340.01, 342.09
Torres v. City of Madera, 648 F.3d 1119 (9th Cir. 2011)—340.01
Torres v. Mercer Canyons Inc., 835 F.3d 1125, 95 Fed. R. Serv. 3d 1022 (9th Cir. 2016)—310.06
Torres v. Salty Sea Days, Inc., 36 Wash. App. 668, 676 P.2d 512 (Div. 1 1984)—100.09, 370.07
Torrey v. City of Tukwila, 76 Wash. App. 32, 882 P.2d 799 (Div. 1 1994)—340.00, 340.01, 340.02
Torrez v. Peck, 57 Wash. 2d 302, 356 P.2d 703 (1960)—70.06
Tortes v. King County, 119 Wash. App. 1, 84 P.3d 252 (Div. 1 2003)—100.01, 100.03
Town of Issaquah, Petition of, 31 Wash. 2d 556, 197 P.2d 1018 (1948)—151.06
Transamerica Title Ins. Co. v. Johnson, 103 Wash. 2d 409, 693 P.2d 697 (1985)—320.00
Transue v. Aesthetech Corp., 341 F.3d 911 (9th Cir. 2003)—110.01, 110.02.01
Trans World Airlines, Inc. v. Hardison, 432 U.S. 63, 97 S. Ct. 2264, 53 L. Ed. 2d 113 (1977)—330.42
Trask v. Butler, 123 Wash. 2d 835, 872 P.2d 1080 (1994)—107.02
Traverso v. Pupo, 51 Wash. 2d 149, 316 P.2d 462 (1957)—12.01.01
Travis v. Washington Horse Breeders Ass'n, Inc., 111 Wash. 2d 396, 759 P.2d 418, 6 U.C.C. Rep. Serv. 2d 1093 (1988)—310.02
Trendwest Resorts, Inc. v. Ford, 103 Wash. App. 380, 12 P.3d 613 (Div. 1 2000)—301.03
Trevino v. Gates, 99 F.3d 911, 45 Fed. R. Evid. Serv. 1143 (9th Cir. 1996)—341.01
Trimble v. Washington State University, 140 Wash. 2d 88, 993 P.2d 259, 141 Ed. Law Rep. 917 (2000)—302.11
Trizuto v. Bellevue Police Dept., 983 F. Supp. 2d 1277 (W.D. Wash. 2013)—330.05, 330.06, 330.23
Trotland v. New England Mut. Life Ins. Co., 1 Wash. App. 303, 462 P.2d 244 (Div. 2 1969)—24.03
Truck Ins. Exchange v. Vanport Homes, Inc., 147 Wash. 2d 751, 58 P.3d 276 (2002)—320.00, 320.06
Truck Ins. Exchange of Farmers Ins. Group v. Century Indem. Co., 76 Wash. App. 527, 887 P.2d 455 (Div. 3 1995)—320.05
Trueax v. Ernst Home Center, Inc., 124 Wash. 2d 334, 878 P.2d 1208 (1994)—60.03

Trueax v. Ernst Home Center, Inc., 70 Wash. App. 381, 853 P.2d 491 (Div. 3 1993)—60.03, 120.07
Trust Corp. of Montana v. Piper Aircraft Corp., 506 F. Supp. 1093 (D. Mont. 1981)—110.02.03
TT Properties v. City of Tacoma, 192 Wash. App. 238, 366 P.3d 465 (Div. 2 2016)—151.01
Tucker v. Hayford, 118 Wash. App. 246, 75 P.3d 980 (Div. 3 2003)—130.01, 130.06
Turay, In re, 150 Wash. 2d 71, 74 P.3d 1194 (2003)—365.10, 365.15
Turner v. Murray, 476 U.S. 28, 106 S. Ct. 1683, 90 L. Ed. 2d 27 (1986)—1.01, 360.01, 365.01, 365.30
Turner v. Stime, 153 Wash. App. 581, 222 P.3d 1243 (Div. 3 2009)—1.01, 1.08, 1.11, 150.16, 360.01, 360.20, 365.01, 365.20, 365.30
Turner v. City of Tacoma, 72 Wash. 2d 1029, 435 P.2d 927 (1967)—0.10
Tuttle v. Allstate Ins. Co., 134 Wash. App. 120, 138 P.3d 1107 (Div. 2 2006)—12.02
Twining, In re, 77 Wash. App. 882, 894 P.2d 1331 (Div. 3 1995)—365.11, 365.12.01
Tyler v. Grange Ins. Ass'n, 3 Wash. App. 167, 473 P.2d 193 (Div. 1 1970)—320.00, 320.05
Tyner v. State, 137 Wash. App. 545, 154 P.3d 920 (Div. 2 2007)—330.06
Tyner v. State Dept. of Social and Health Services, Child Protective Services, 141 Wash. 2d 68, 1 P.3d 1148 (2000)—15.01, 15.05

U

Ueland v. Reynolds Metals Co., 103 Wash. 2d 131, 691 P.2d 190 (1984)—31.03.01, 32.05
Uhlrig v. Harder, 64 F.3d 567 (10th Cir. 1995)—340.02
Ulve v. City of Raymond, 51 Wash. 2d 241, 317 P.2d 908 (1957)—70.01
Union Elevator & Warehouse Co., Inc. v. State ex rel. Dept. of Transp., 96 Wash. App. 288, 980 P.2d 779 (Div. 3 1999)—151.01, 151.04
United Steelworkers of America v. Phelps Dodge Corp., 865 F.2d 1539 (9th Cir. 1989)—340.03
University of Washington v. Government Employees Insurance Company, 200 Wash. App. 455, 404 P.3d 559, 348 Ed. Law Rep. 1033 (Div. 1 2017)—310.02
Urban v. Mid-Century Ins., 79 Wash. App. 798, 905 P.2d 404 (Div. 2 1995)—301.08
U.S. v. Brooks, 367 F.3d 1128 (9th Cir. 2004)—342.07
U.S. v. Bulacan, 156 F.3d 963 (9th Cir. 1998)—342.04
U.S. v. Castillo, 866 F.2d 1071 (9th Cir. 1988)—342.06
U.S. v. Faulkner, 450 F.3d 466 (9th Cir. 2006)—342.02
U.S. v. Gooch, 6 F.3d 673 (9th Cir. 1993)—342.07
U.S. v. Jones, 565 U.S. 400, 132 S. Ct. 945, 181 L. Ed. 2d 911 (2012)—342.04
U.S. v. Lundin, 817 F.3d 1151 (9th Cir. 2016)—342.07
U.S. v. Mendenhall, 446 U.S. 544, 100 S. Ct. 1870, 64 L. Ed. 2d 497 (1980)—342.06

U.S. v. Oliver, 766 F.2d 252 (6th Cir. 1985)—6.13.01
U.S. v. Snipe, 515 F.3d 947 (9th Cir. 2008)—342.07
U.S. v. Sokolow, 490 U.S. 1, 109 S. Ct. 1581, 104 L. Ed. 2d 1 (1989)—342.10
U.S. v. Spires, 3 F.3d 1234 (9th Cir. 1993)—342.06
U.S. v. Vasey, 834 F.2d 782 (9th Cir. 1987)—342.05

V

Vacova Co. v. Farrell, 62 Wash. App. 386, 814 P.2d 255 (Div. 1 1991)—302.03
Vance v. Ball State University, 570 U.S. 421, 133 S. Ct. 2434, 186 L. Ed. 2d 565, 293 Ed. Law Rep. 611 (2013)—330.22
Vanderhoff v. Fitzgerald, 72 Wash. 2d 103, 431 P.2d 969 (1967)—15.01, 70.04
Van Dinter v. City of Kennewick, 121 Wash. 2d 38, 846 P.2d 522 (1993)—120.05, 120.07
Van Dinter v. Orr, 157 Wash. 2d 329, 138 P.3d 608 (2006)—165.01, 165.05
Van Hook v. Anderson, 64 Wash. App. 353, 824 P.2d 509 (Div. 2 1992)—105.01
Van Noy v. State Farm Mut. Auto. Ins. Co., 142 Wash. 2d 784, 16 P.3d 574 (2001)—320.01, 320.03
Van Ry v. Montgomery, 58 Wash. 2d 46, 360 P.2d 573 (1961)—12.03, 70.04
Vanwagenen v. Roy, 21 Wash. App. 581, 587 P.2d 173 (Div. 2 1978)—70.04
Vasquez v. State, Dept. of Social and Health Services, 94 Wash. App. 976, 974 P.2d 348 (Div. 3 1999)—352.01
Venegas v. Wagner, 831 F.2d 1514 (9th Cir. 1987)—340.02
Versuslaw, Inc. v. Stoel Rives, LLP, 127 Wash. App. 309, 111 P.3d 866 (Div. 1 2005)—107.09
Vicwood Meridian Partnership v. Skagit Sand and Gravel, 123 Wash. App. 877, 98 P.3d 1277 (Div. 2 2004)—380.00
Villegas v. Gilroy Garlic Festival Ass'n, 541 F.3d 950 (9th Cir. 2008)—340.03
Vioen v. Cluff, 69 Wn.2d 306,418—11.04
Virginia v. Moore, 553 U.S. 164, 128 S. Ct. 1598, 170 L. Ed. 2d 559 (2008)—342.05
Vliet v. Department of Labor and Industries, 30 Wash. App. 709, 638 P.2d 112 (Div. 2 1981)—155.08
Vodopest v. MacGregor, 128 Wash. 2d 840, 913 P.2d 779 (1996)—13.04
Voelker v. Joseph, 62 Wash. 2d 429, 383 P.2d 301 (1963)—302.07
Vogt v. Seattle-First Nat. Bank, 117 Wash. 2d 541, 817 P.2d 1364 (1991)—310.02

W

Wagenblast v. Odessa School Dist. No. 105-157-166J, 110 Wash. 2d 845, 758 P.2d 968, 48 Ed. Law Rep. 676, 85 A.L.R.4th 331 (1988)—13.04

Wagner v. Flightcraft, Inc., 31 Wash. App. 558, 643 P.2d 906 (Div. 1 1982)—34.02
Wagner v. Monteilh, 43 Wash. App. 908, 720 P.2d 847 (Div. 3 1986)—30.06
Wagner v. Wagner, 95 Wash. 2d 94, 621 P.2d 1279 (1980)—301.07, 302.07
Wakefield v. Wakefield, 59 Wash. 2d 550, 368 P.2d 909 (1962)—24.03
Walker v. Bangs, 92 Wash. 2d 854, 601 P.2d 1279 (1979)—107.05
Walker v. King County Metro, 126 Wash. App. 904, 109 P.3d 836 (Div. 1 2005)—12.02, 100.01
Walker v. State, 67 Wash. App. 611, 837 P.2d 1023 (Div. 2 1992)—15.05
Walker v. State, 48 Wash. 2d 587, 295 P.2d 328 (1956)—151.03, 151.04
Wallace v. Kuehner, 111 Wash. App. 809, 46 P.3d 823 (Div. 2 2002)—302.04
Wallace Real Estate Inv., Inc. v. Groves, 124 Wash. 2d 881, 881 P.2d 1010 (1994)—300.02, 302.02, 302.04
Wallace Real Estate Inv., Inc. v. Groves, 124 Wn.2d 124—302.04
Waller v. State, 64 Wash. App. 318, 824 P.2d 1225 (Div. 1 1992)—32.06.01
Walter Implement, Inc. v. Focht, 107 Wash. 2d 553, 730 P.2d 1340 (1987)—300.02, 302.02
Ward v. Arnold, 52 Wash. 2d 581, 328 P.2d 164 (1958)—107.04
Ward v. Hinkleman, 37 Wash. 375, 79 P. 956 (1905)—130.04
Ward v. Painters' Local Union No. 300, 45 Wash. 2d 533, 276 P.2d 576 (1954)—33.01, 33.03
Ward v. Richards & Rossano, Inc., P.S., 51 Wash. App. 423, 754 P.2d 120 (Div. 1 1988)—107.09
Ward v. Thompson, 57 Wash. 2d 655, 359 P.2d 143 (1961)—120.05
Ward v. Zeugner, 64 Wash. 2d 570, 392 P.2d 811 (1964)—60.03
Wardhaugh v. Weisfield's Inc., 43 Wash. 2d 865, 264 P.2d 870 (1953)—120.06.02
Warren v. Norguard, 103 Wash. 284, 174 P. 7 (1918)—72.05
Washburn v. Beatt Equipment Co., 120 Wash. 2d 246, 840 P.2d 860 (1992)—41.04, 110.04
Washington v. Boeing Co., 105 Wash. App. 1, 19 P.3d 1041 (Div. 1 2000)—330.21, 330.24
Washington Irr. and Development Co. v. Sherman, 106 Wash. 2d 685, 724 P.2d 997 (1986)—155.07
Washington Mut. Sav. Bank v. Hedreen, 125 Wash. 2d 521, 886 P.2d 1121 (1994)—301.09
Washington State Coalition for the Homeless v. Department of Social and Health Services, 133 Wash. 2d 894, 949 P.2d 1291 (1997)—340.00
Washington State Hop Producers, Inc., Liquidation Trust v. Goschie Farms, Inc., 112 Wash. 2d 694, 773 P.2d 70 (1989)—302.09, 302.10
Washington State Physicians Ins. Exchange & Ass'n v. Fisons Corp., 122 Wash. 2d 299, 858 P.2d 1054 (1993)—30.06, 110.03, 110.30.01, 310.01, 310.06, 310.07

Washington State Republican Party v. Washington State Public Disclosure Com'n, 141 Wash. 2d 245, 4 P.3d 808 (2000)—340.00
Waterjet Technology, Inc. v. Flow Intern. Corp., 140 Wash. 2d 313, 996 P.2d 598 (2000)—351.02
Watson v. Emard, 165 Wash. App. 691, 267 P.3d 1048, 97 A.L.R.6th 783 (Div. 2 2011)—72.05
Watson v. Fort Worth Bank and Trust, 487 U.S. 977, 108 S. Ct. 2777, 101 L. Ed. 2d 827 (1988)—330.02
Watson v. Hockett, 107 Wash. 2d 158, 727 P.2d 669 (1986)—105.01, 105.07, 105.08
Watson v. Ingram, 124 Wash. 2d 845, 881 P.2d 247 (1994)—303.07
Weber v. Biddle, 4 Wash. App. 519, 483 P.2d 155 (Div. 1 1971)—302.07
Weiss v. Lonnquist, 153 Wash. App. 502, 224 P.3d 787 (Div. 1 2009)—301.02
Welch v. Southland Corp., 134 Wash. 2d 629, 952 P.2d 162 (1998)—14.02, 41.04, 110.30.02
Wells v. City of Vancouver, 77 Wash. 2d 800, 467 P.2d 292 (1970)—15.01.01
Welsh v. Spokane & I. E. R. Co., 91 Wash. 260, 157 P. 679 (1916)—100.09
Wendt v. Department of Labor and Industries, 18 Wash. App. 674, 571 P.2d 229 (Div. 2 1977)—155.02, 155.06, 155.07.01, 155.20
West v. Atkins, 487 U.S. 42, 108 S. Ct. 2250, 101 L. Ed. 2d 40 (1988)—340.03
West v. Port of Olympia, 146 Wash. App. 108, 192 P.3d 926 (Div. 1 2008)—351.02
Western Washington Cement Masons Health & Sec. Trust Funds v. Hillis Homes, Inc., 26 Wash. App. 224, 612 P.2d 436 (Div. 1 1980)—301.10
Westmark Development Corp. v. City of Burien, 140 Wash. App. 540, 166 P.3d 813 (Div. 1 2007)—352.03
Weyerhaeuser Real Estate Co. v. Stoneway Concrete, Inc., 96 Wash. 2d 558, 637 P.2d 647 (1981)—302.10
Whaley v. State, Dept. of Social and Health Services, 90 Wash. App. 658, 956 P.2d 1100 (Div. 1 1998)—120.07
Wharf Restaurant, Inc. v. Port of Seattle, 24 Wash. App. 601, 605 P.2d 334 (Div. 1 1979)—301.02
Wheeler v. Catholic Archdiocese of Seattle, 65 Wash. App. 552, 829 P.2d 196 (Div. 1 1992)—330.36, 330.82
Whitchurch v. McBride, 63 Wash. App. 272, 818 P.2d 622 (Div. 2 1991)—1.02, 70.02
White v. Department of Labor and Industries, 48 Wash. 2d 413, 293 P.2d 764 (1956)—155.12
White v. Ford Motor Co., 500 F.3d 963 (9th Cir. 2007)—35.01
White v. Kent Medical Center, Inc., P.S., 61 Wash. App. 163, 810 P.2d 4 (Div. 1 1991)—105.01, 105.02
White v. Peters, 52 Wash. 2d 824, 329 P.2d 471 (1958)—12.01, 16.04.01

White v. Roper, 901 F.2d 1501 (9th Cir. 1990)—342.03
White v. State, 131 Wash. 2d 1, 929 P.2d 396 (1997)—340.06
Whiteley v. Warden, Wyo. State Penitentiary, 401 U.S. 560, 91 S. Ct. 1031, 28 L. Ed. 2d 306 (1971)—340.06
White River Estates v. Hiltbruner, 134 Wash. 2d 761, 953 P.2d 796 (1998)—310.06, 352.01
Whiteside v. Lukson, 89 Wash. App. 109, 947 P.2d 1263 (Div. 3 1997)—105.04
Whitley v. Albers, 475 U.S. 312, 106 S. Ct. 1078, 89 L. Ed. 2d 251 (1986)—342.01, 342.03, 343.03
Whitley v. Albers, 75 U.S. 312, 106 S.Ct. 1078, 89 L.Ed.2d 251 (1986)—343.08
Whitlock v. Northern Pac. Ry. Co., 59 Wash. 15, 109 P. 188 (1910)—100.09
Whren v. U.S., 517 U.S. 806, 116 S. Ct. 1769, 135 L. Ed. 2d 89 (1996)—342.05
Wilder v. Virginia Hosp. Ass'n, 496 U.S. 498, 110 S. Ct. 2510, 110 L. Ed. 2d 455 (1990)—340.00
Wilhelm v. Beyersdorf, 100 Wash. App. 836, 999 P.2d 54 (Div. 3 2000)—301.09
Wilkerson v. Wegner, 58 Wash. App. 404, 793 P.2d 983 (Div. 3 1990)—303.01
Wilkins v. Gaddy, 559 U.S. 34, 130 S. Ct. 1175, 175 L. Ed. 2d 995 (2010)—343.08
Will v. Michigan Dept. of State Police, 491 U.S. 58, 109 S. Ct. 2304, 105 L. Ed. 2d 45 (1989)—340.00
Willener v. Sweeting, 107 Wash. 2d 388, 730 P.2d 45 (1986)—300.02, 302.02
Williams v. Kingston Inn, Inc., 58 Wash. App. 348, 792 P.2d 1282 (Div. 3 1990)—370.02
Williams v. Lifestyle Lift Holdings, Inc., 175 Wash. App. 62, 302 P.3d 523 (Div. 1 2013)—105.06, 310.06
Williams ex rel. Hart v. Paint Valley Local School Dist., 400 F.3d 360, 196 Ed. Law Rep. 27, 2005 FED App. 0118P (6th Cir. 2005)—341.02
Williams Fruit Co. v. Hanover Ins. Co., 3 Wash. App. 276, 474 P.2d 577 (Div. 3 1970)—301.04
Williamson v. Allied Group, Inc., 117 Wash. App. 451, 72 P.3d 230 (Div. 1 2003)—130.01, 130.02
Willis v. Champlain Cable Corp., 109 Wash. 2d 747, 748 P.2d 621 (1988)—302.11
Wilmot v. Kaiser Aluminum and Chemical Corp., 118 Wash. 2d 46, 821 P.2d 18 (1991)—15.02, 330.05
Wilson v. Department of Labor and Industries, 6 Wash. App. 902, 496 P.2d 551 (Div. 1 1972)—155.07
Wilson v. Grant, 162 Wash. App. 731, 258 P.3d 689 (Div. 3 2011)—31.01.01, 105.02.03

Wilson v. Key Tronic Corp., 40 Wash. App. 802, 701 P.2d 518 (Div. 3 1985)—30.06
Wilson v. Lund, 80 Wash. 2d 91, 491 P.2d 1287 (1971)—32.06.01
Wilson v. Oregon-Washington R. & Navigation Co., 71 Wash. 102, 127 P. 847 (1912)—150.06
Wilson v. Seiter, 501 U.S. 294, 111 S. Ct. 2321, 115 L. Ed. 2d 271 (1991)—343.00, 343.02, 343.04, 343.06
Wilson v. Steinbach, 98 Wash. 2d 434, 656 P.2d 1030 (1982)—370.01, 370.02
Wilson v. Thermal Energy, Inc., 21 Wash. App. 153, 583 P.2d 679 (Div. 1 1978)—120.04
Wilson v. City of Walla Walla, 12 Wash. App. 152, 528 P.2d 1006 (Div. 3 1974)—30.06
Wilson, In re Marriage of, 117 Wash. App. 40, 68 P.3d 1121 (Div. 3 2003)—301.10
Wiltse v. Albertson's Inc., 116 Wash. 2d 452, 805 P.2d 793 (1991)—120.06.02
Windle v. Huson, 32 Wash. App. 230, 646 P.2d 790 (1982)—2.06
Winter v. Mackner, 68 Wash. 2d 943, 416 P.2d 453 (1966)—120.01, 120.02
Wlasiuk v. Whirlpool Corp., 81 Wash. App. 163, 914 P.2d 102 (Div. 1 1996)—300.02
Wojcik v. Chrysler Corp., 50 Wash. App. 849, 751 P.2d 854 (Div. 2 1988)—140.01
Wold v. Gardner, 167 Wash. 191, 8 P.2d 975 (1932)—12.01.01
Wold v. Gardner, 159 Wash. 665, 294 P. 574 (1930)—12.01.01
Woo v. Fireman's Fund Ins. Co., 150 Wash. App. 158, 208 P.3d 557 (Div. 1 2009)—320.00
Woo v. Fireman's Fund Ins. Co., 137 Wash. App. 480, 154 P.3d 236 (Div. 1 2007)—351.02
Woo v. General Electric Company, 198 Wash. App. 496, 393 P.3d 869 (Div. 1 2017)—110.03
Wood v. City of Bellingham, 62 Wash. App. 61, 813 P.2d 142 (Div. 1 1991)—70.02.04, 70.02.06
Wood v. Chicago, M., St. P. & P. R. R. Co., 45 Wn.2d 601, 277 P.2d 345, 283 P.2d 688 (1954)—60.01.01
Woodinville, City of v. Northshore United Church of Christ, 166 Wash. 2d 633, 211 P.3d 406 (2009)—380.01
Woodinville, City of v. Northshore United Church of Christ, 139 Wash. App. 639, 162 P.3d 427 (Div. 1 2007)—380.04
Woods v. Goodson, 55 Wash. 2d 687, 349 P.2d 731 (1960)—20.01
Woodward v. Steele, 32 Wash. App. 152, 646 P.2d 167 (Div. 1 1982)—14.03.04
Woody v. Stapp, 146 Wash. App. 16, 189 P.3d 807 (Div. 3 2008)—301.11, 352.01
Wooldridge v. Woolett, 96 Wash. 2d 659, 638 P.2d 566 (1981)—32.06.01
Worley v. Providence Physician Services Co., 175 Wash. App. 566, 307 P.3d 759 (Div. 3 2013)—301A.01

W.R.G., In re, 110 Wash. App. 318, 40 P.3d 1177 (Div. 2 2002)—360.05
Wright v. Beardsley, 46 Wash. 16, 89 P. 172 (1907)—303.01
Wright v. Engum, 124 Wash. 2d 343, 878 P.2d 1198 (1994)—70.01
Wright v. Jeckle, 104 Wash. App. 478, 16 P.3d 1268 (Div. 3 2001)—310.09
Wright v. City of Kennewick, 62 Wash. 2d 163, 381 P.2d 620 (1963)—140.01, 140.02
Wright v. Lyft, Inc., 189 Wash. 2d 718, 406 P.3d 1149 (2017)—310.03
Wright v. Miller, 93 Wash. App. 189, 963 P.2d 934 (Div. 1 1998)—130.06, 301A.01
Wright v. Safeway Stores, 7 Wash. 2d 341, 109 P.2d 542, 135 A.L.R. 1367 (1941)—5.01
Wunderly v. S.C. Johnson & Son, Inc., 828 F. Supp. 801 (D. Or. 1993)—330.52
Wuthrich v. King County, 185 Wash. 2d 19, 366 P.3d 926 (2016)—140.01, 140.01.01
Wyeth v. Levine, 555 U.S. 555, 129 S. Ct. 1187, 173 L. Ed. 2d 51 (2009)—110.00

X

Xiao Ping Chen v. City of Seattle, 153 Wash. App. 890, 223 P.3d 1230 (Div. 1 2009)—140.01
Xieng v. Peoples Nat. Bank of Washington, 120 Wash. 2d 512, 844 P.2d 389 (1993)—330.81
Xieng v. Peoples Nat. Bank of Washington, 63 Wash. App. 572, 821 P.2d 520 (Div. 1 1991)—30.17

Y

Yakima County (West Valley) Fire Protection Dist. No. 12 v. City of Yakima, 122 Wash. 2d 371, 858 P.2d 245 (1993)—301.03
Ybarra v. Spangard, 25 Cal. 2d 486, 154 P.2d 687, 162 A.L.R. 1258 (1944)—22.01
Yellow Freight System, Inc. v. Donnelly, 494 U.S. 820, 110 S. Ct. 1566, 108 L. Ed. 2d 834 (1990)—330.00
Yniguez v. Arizonans for Official English, 69 F.3d 920 (9th Cir. 1995)—348.01
Yong Tao v. Heng Bin Li, 140 Wash. App. 825, 166 P.3d 1263 (Div. 3 2007)—50.01, 50.20
Younce v. Ferguson, 106 Wash. 2d 658, 724 P.2d 991 (1986)—120.00, 120.02.01, 120.05, 120.08, 120.08.01
Young v. Caravan Corp., 99 Wash. 2d 655, 663 P.2d 834 (1983)—370.01, 370.07
Young v. Group Health Co-op. of Puget Sound, 85 Wash. 2d 332, 534 P.2d 1349 (1975)—15.01
Young v. Key Pharmaceuticals, Inc., 112 Wash. 2d 216, 770 P.2d 182 (1989)—105.01, 105.02
Young v. City of Providence ex rel. Napolitano, 404 F.3d 4 (1st Cir. 2005)—341.02, 341.04

Young v. Savidge, 155 Wash. App. 806, 230 P.3d 222 (Div. 2 2010)—105.06, 310.09
Young v. City of Seattle, 25 Wash. 2d 888, 172 P.2d 222 (1946)—16.01
Young v. Whidbey Island Bd. of Realtors, 96 Wash. 2d 729, 638 P.2d 1235 (1982)—33.03
Young v. Young, 164 Wash. 2d 477, 191 P.3d 1258 (2008)—301A.02
Young, In re, 122 Wash. 2d 1, 857 P.2d 989 (1993)—365.00, 365.10, 365.11
Youngberg v. Romeo, 457 U.S. 307, 102 S. Ct. 2452, 73 L. Ed. 2d 28 (1982)—343.00
Youngblood v. Schireman, 53 Wash. App. 95, 765 P.2d 1312, 25 A.L.R.5th 807 (Div. 1 1988)—10.07, 14.01, 120.02.01
Young by Young v. Carter, 38 Wash. App. 147, 684 P.2d 784 (Div. 1 1984)—12.06
Young for Young v. Key Pharmaceuticals, Inc., 130 Wash. 2d 160, 922 P.2d 59 (1996)—110.02.01
Yurkovich v. Rose, 68 Wash. App. 643, 847 P.2d 925, 81 Ed. Law Rep. 573 (Div. 1 1993)—13.02, 60.03, 100.01, 100.15

Z

ZeBarth v. Swedish Hospital Medical Center, 81 Wash. 2d 12, 499 P.2d 1, 52 A.L.R.3d 1067 (1972)—22.01
Zellmer v. Zellmer, 164 Wash. 2d 147, 188 P.3d 497 (2008)—14.01
Zellmer v. Zellmer, 132 Wash. App. 674, 133 P.3d 948 (Div. 1 2006)—14.01
Zenaida-Garcia v. Recovery Systems Technology, Inc., 128 Wash. App. 256, 115 P.3d 1017 (Div. 1 2005)—110.08
Zenith Transport, Limited v. Bellingham Nat. Bank, 64 Wash. 2d 967, 395 P.2d 498 (1964)—12.02
Zenkina v. Sisters of Providence in Washington, Inc., 83 Wash. App. 556, 922 P.2d 171 (Div. 1 1996)—105.02.01
Zook v. Baier, 9 Wash. App. 708, 514 P.2d 923 (Div. 1 1973)—12.03, 13.03
Zorich v. Billingsley, 52 Wash. 2d 138, 324 P.2d 255 (1958)—70.02
Zorotovich v. Washington Toll Bridge Authority, 80 Wash. 2d 106, 491 P.2d 1295 (1971)—100.09
Zuniga v. Pay Less Drug Stores, N.W., 82 Wash. App. 12, 917 P.2d 584 (Div. 1 1996)—120.02

Index

ACCESS
Eminent Domain, this index

AFFIRMATIVE DEFENSES
Nuisance, absence of, burden of proof, **§ 380.05**
Tortious Interference with Economic Relations, this index

AFTER-ACQUIRED EVIDENCE
Employment discrimination, damages, **§ 330.81 to 330.81.02**

AGENCY PLANS
Eminent domain, partial taking, **§ 150.13**

AGGRAVATION
Workers' Compensation, this index

AGREEMENTS
Contracts, this index

AIR
Eminent Domain, this index

ALCOHOLIC BEVERAGES
Generally, **§ 370.01 et seq.**
Assault, person apparently under influence of alcohol or obviously intoxicated person, **§ 370.04, 370.05**
Burden of proof
minor, furnishing alcohol to, **§ 370.08, 370.10, 370.13**
person apparently under influence of alcohol or obviously intoxicated person, **§ 370.03, 370.05**
Certification card defense, furnishing alcohol to minor, **§ 370.11**
Commercial vendors
minor, furnishing alcohol to, **§ 370.07 to 370.11**
quasi-commercial host, definitions, **§ 370.06**
Minor, furnishing alcohol to
generally, **§ 370.07 to 370.13**
burden of proof, **§ 370.08, 370.10, 370.13**
certification card defense, **§ 370.11**
commercial vendors, **§ 370.07 to 370.11**
minor transferee, **§ 370.09, 370.10**
social hosts, **§ 370.12, 370.13**
Obviously intoxicated person. Person apparently under influence of alcohol or obviously intoxicated person, below
Person apparently under influence of alcohol or obviously intoxicated person
generally, **§ 370.01 to 370.05**

ALCOHOLIC BEVERAGES—Cont'd
Person apparently under influence of alcohol or obviously intoxicated person —Cont'd
assault, **§ 370.04, 370.05**
burden of proof, **§ 370.03, 370.05**
duty, **§ 370.01**
obviously intoxicated person, defined, **§ 370.02**
person apparently under influence of alcohol, defined, **§ 370.01.01**
Social hosts, furnishing alcohol to minor, **§ 370.12, 370.13**

ANTICIPATORY BREACH
Contracts, **§ 302.04**

ARREST
Search and Seizure, this index

ASSAULT
Alcoholic beverages, person apparently under influence of alcohol or obviously intoxicated person, **§ 370.04, 370.05**

ASSISTED OUTPATIENT TREATMENT
Mental Illness, this index

ASSUMPTION OF RISK
Nuisance, burden of proof, **§ 380.06**

BAD FAITH
Good Faith, this index

BALANCING TEST
Nuisance, **§ 380.03**

BONA FIDE OCCUPATIONAL QUALIFICATION
Employment discrimination, **§ 330.04**

BREACH OF CONTRACT
Contracts, this index

BURDEN OF PROOF
Alcoholic Beverages, this index
Breach of contract, affirmative defenses, **§ 300.02, 300.03**
Eminent domain, **§ 150.04**
Employment Discrimination, this index
Fraud, this index
Insurance Bad Faith, this index
Mental illness, **§ 360.06**
Municipal and local government liability, failure to train, supervise or instruct, **§ 341.02**
Negligent misrepresentation, failure to disclose information, **§ 165.02**
Nuisance, this index
Prisons and Prisoners, this index
Search and Seizure, this index
Tortious Interference with Economic Relations, this index

BURDEN OF PROOF—Cont'd
Trade secrets, **§ 351.01**
Workers' Compensation, this index

BUSINESS EXPECTANCY
Tortious Interference with Economic Relations, this index

BUSINESS INCOME
Eminent domain, profits, **§ 151.05**

BUSINESS NECESSITY
Employment discrimination, disparate impact, **§ 330.01.02, 330.01.03**

CAUSATION
Civil rights, comment only, **§ 340.06**
Consumer protection, **§ 310.07**

CERTIFICATION CARDS
Alcoholic beverages, furnishing alcohol to minor, **§ 370.11**

CHILDREN
Alcoholic Beverages, this index

CIRCUITY OF TRAVEL
Eminent domain, **§ 151.04**

CIVIL RIGHTS
Generally, **§ 340.00 et seq., 341.01 et seq., 342.01 et seq., 343.00 et seq., 348.01 et seq.**
Causation, comment only, **§ 340.06**
Causes to be subjected, defined, **§ 340.04**
Compensatory damages, **§ 348.01**
Damages and verdict forms
generally, **§ 348.01 et seq.**
compensatory damages, **§ 348.01**
punitive damages, below
Deliberate indifference, defined, **§ 340.05**
Employment Discrimination, this index
Individual defendant, burden of proof on issues, **§ 340.02**
Municipal and Local Government Liability, this index
Prisons and Prisoners, this index
Punitive damages
generally, **§ 348.02 to 348.12**
individual defendant, **§ 348.02 to 348.11**
municipal liability, unreasonable force, **§ 348.12**
unreasonable force, **§ 348.10 to 348.12**
Search and Seizure, this index
Section 1983 cases, claims instruction, **§ 340.01**
Subjects, defined, **§ 340.04**
Training, failure to train or inadequacy of, **§ 340.05**
Under color of law, defined, **§ 340.03**
Unreasonable force, punitive damages, **§ 348.10 to 348.12**

CIVIL RIGHTS—Cont'd
Verdicts. Damages and verdict forms, above

CLEAR, COGENT AND CONVINCING EVIDENCE
Negligent Misrepresentation, this index

COMING TO NUISANCE
Nuisance, burden of proof, § **380.06**

COMMERCIAL LITIGATION
Generally, § **351.01 et seq., 352.01 et seq.**
Tortious Interference with Economic Relations, this index
Trade Secrets, this index

COMMERCIAL VENDORS
Alcoholic Beverages, this index

COMPARABLE SALES
Eminent domain, § **151.12**

COMPETITION
Tortious interference with economic relations, business expectancy, § **352.05**

CONDEMNATION
Eminent Domain, this index

CONDITIONAL RELEASE
Sexually Violent Predators, this index

CONDITIONS
Breach of contract, conditions precedent or conditions concurrent, § **302.02**
Prisons and Prisoners, this index

CONSENT
Search and seizure, unreasonable search, § **341.06**

CONSIDERATION
Contracts, § **301.04**

CONSTRUCTION AND INTERPRETATION
Contracts, this index
Eminent domain, partial taking, § **150.14**

CONSTRUCTIVE DISCHARGE
Employment discrimination, wrongful termination in violation of public policy, burden of proof, § **330.52**

CONSUMER PROTECTION
Generally, § **310.00 et seq.**
Causation, § **310.07**
Elements of violation of Consumer Protection Act, § **310.01**
Injury, § **310.06**
Private disputes, public interest, § **310.05**
Public interest
generally, § **310.04**

CONSUMER PROTECTION—Cont'd
Public interest—Cont'd
private disputes, **§ 310.05**
Reasonableness defense, **§ 310.02**
Trade or commerce, defined, **§ 310.09**
Unfair or deceptive act or practice, defined, **§ 310.08**

CONTRACTS
Generally, **§ 300.00 et seq., 301A.01 et seq., 301.01 et seq., 302.01 et seq., 303.01 et seq.**
Anticipatory breach, **§ 302.04**
Breach of contract
generally, **§ 302.01 to 302.3**
anticipatory breach, **§ 302.04**
burden of proof, affirmative defenses, **§ 300.02, 300.03**
conditions precedent or conditions concurrent, **§ 302.02**
issues, damages, **§ 300.01**
material breach, defined, **§ 302.03**
nonperformance of duty, **§ 302.01**
Burden of proof, breach of contract, affirmative defenses, **§ 300.02, 300.03**
Conditions precedent or conditions concurrent, breach of contract, **§ 302.02**
Consideration, **§ 301.04**
Contract, defined, **§ 301.01**
Counterclaims, measure of expectation damages, **§ 303.01, 303.02**
Direct damages, measure of damages, **§ 303.03**
Duress, **§ 301.10**
Enforceability
generally, **§ 301.08 to 301.11**
duress, **§ 301.10**
mutual mistake, **§ 301.08**
undue influence, **§ 301.11**
unilateral mistake, **§ 301.09**
Equitable alternatives, **§ 301A.01, 301A.02**
Equitable estoppel, **§ 302.05, 302.06**
Excuse of performance. Performance, below
Expectation damages, measure of, **§ 303.01, 303.02**
Fair dealing and good faith, implied duty, **§ 302.11**
Formation
generally, **§ 301.01 to 301.04**
consideration, **§ 301.04**
contract, defined, **§ 301.01**
mutual assent, **§ 301.03**
promise, defined, **§ 301.02**
Frustration of purpose, **§ 302.10**
Good faith and fair dealing, implied duty, **§ 302.11**
Impossibility or impracticability, **§ 302.09**
Interference with contractual performance, **§ 302.08**

CONTRACTS—Cont'd
Interpretation
generally, **§ 301.05**
parol evidence, **§ 301.06**
Issues
breach of contract, damages, **§ 300.01**
contract, **§ 300.01.01**
Liquidated damages, **§ 303.07**
Lost profits, **§ 303.04**
Material breach, defined, **§ 302.03**
Mistake, **§ 301.08, 301.09**
Mitigation of damages, **§ 303.06**
Modification, **§ 301.07**
Mutual assent, **§ 301.03**
Mutual mistake, **§ 301.08**
Nonperformance of duty, breach of contract, **§ 302.01**
Parol evidence, interpretation, **§ 301.06**
Performance
generally, **§ 302.04 to 302.11**
anticipatory breach, **§ 302.04**
breach of contract, above
equitable estoppel, **§ 302.05, 302.06**
excuse of performance, **§ 302.04 to 302.10**
frustration of purpose, **§ 302.10**
good faith and fair dealing, implied duty, **§ 302.11**
impossibility or impracticability, **§ 302.09**
interference with contractual performance, **§ 302.08**
waiver, **§ 302.07**
Promise, defined, **§ 301.02**
Promissory estoppel, **§ 301A.01**
Quasi-contract, **§ 301A.02**
Reliance damages, **§ 303.05**
Remedies
generally, **§ 303.01 to 303.08**
counterclaims, measure of expectation damages, **§ 303.01, 303.02**
direct damages, measure of damages, **§ 303.03**
expectation damages, measure of, **§ 303.01, 303.02**
issues, breach of contract, damages, **§ 300.01**
liquidated damages, **§ 303.07**
lost profits, **§ 303.04**
mitigation of damages, **§ 303.06**
reliance damages, **§ 303.05**
restitution, **§ 303.08**
Restitution, **§ 303.08**
Tortious Interference with Economic Relations, this index
Undue influence, **§ 301.11**
Unilateral mistake, **§ 301.09**

CONTRACTS—Cont'd
Waiver of performance, § **302.07**

COOPERATION OF EMPLOYEE
Employment discrimination, reasonable accommodation, disability discrimination, § **330.35**

COSTS
Eminent Domain, this index

COUNTERCLAIMS
Contracts, measure of expectation damages, § **303.01, 303.02**

CREED, DISCRIMINATION ON BASIS OF
Employment Discrimination, this index

DAMAGES
Civil Rights, this index
Employment Discrimination, this index
Mitigation of Damages, this index
Punitive Damages, this index

DEFINITIONS
Adverse employment action, § **330.01.02, 330.06**
Assisted outpatient treatment, in need of, § **360.05.03**
Business necessity, § **330.01.02**
Causes to be subjected, § **340.04**
Contract, § **301.01**
Custody, § **360.11**
Deliberate indifference, § **340.05, 341.04**
Disability, § **330.31**
Doubt, § **365.35**
Essential function, § **330.37**
Failure to accommodate, § **330.40**
Fair market value, § **150.08**
Gravely disabled, § **360.12**
History of violent acts, § **360.13.01**
Impairment, § **330.31.01**
Improper means, § **351.04, 352.03**
Improper purpose, § **352.03**
Independent economic value, § **351.05**
Less restrictive alternative, § **365.32**
Likelihood of serious harm, § **360.13**
Likely to engage, § **365.14**
Manager and management, § **330.24**
Material breach, § **302.03**
Mental abnormality, § **365.12**
Mental disorder, § **360.10**
Misappropriation, § **351.03**
Nuisance, § **380.01, 380.01.01**
Obviously intoxicated person, § **370.02**

DEFINITIONS—Cont'd
Occupational disease, § **155.30**
Overt act, § **360.13.01**
Personality disorder, § **365.12.01**
Person apparently under influence of alcohol, § **370.01.01**
Predatory, § **365.13**
Promise, § **301.02**
Public/private nuisance, § **380.02**
Quasi-commercial host, § **370.06**
Readily ascertainable, § **351.06**
Reasonable accommodation, § **330.34**
Reasonable doubt, § **365.11**
Reasonable efforts to maintain secrecy, § **351.08**
Recent overt act, § **365.15**
Reverse engineering, § **351.07**
Seizure of person, § **341.02**
Sexual violence, § **365.16**
Subjects, § **340.04**
Trade or commerce, § **310.09**
Trade secret, § **351.02**
Treatment, § **155.31**
Under color of law, § **340.03**
Unfair or deceptive act or practice, § **310.08**
Unreasonable force, § **341.03**
Violent act, § **360.13.01**

DELIBERATE INDIFFERENCE
Civil rights, § **340.05**
Prisons and Prisoners, this index

DISABILITY DISCRIMINATION
Employment Discrimination, this index

DISCLOSURES
Negligent Misrepresentation, this index

DISCRIMINATION
Civil Rights, this index

DISPARATE IMPACT
Employment Discrimination, this index

DISPARATE TREATMENT
Employment Discrimination, this index

DIVERSION OF TRAFFIC
Eminent domain, access, § **151.03**

DOCTORS
Workers' compensation, testimony of attending physician, § **155.13.01**

DURESS
Contracts, **§ 301.10**

EASEMENT
Eminent domain, measure of compensation, **§ 150.06.01**

EIGHTH AMENDMENT
Prisons and Prisoners, this index

EMINENT DOMAIN
Generally, **§ 150.00 et seq., 151.00 et seq.**
Abutting public way, access, light, view and air, **§ 151.01**
Access
circuity of travel to and from property, **§ 151.04**
diversion of traffic, **§ 151.03**
Access, light, view and air
generally, **§ 150.12**
abutting public way, **§ 151.01**
measure of compensation, **§ 151.02**
Advance oral instruction, **§ 150.01**
Agency plans, partial taking, **§ 150.13**
Air. Access, light, view and air, above
Burden of proof, **§ 150.04**
Business income, profits, **§ 151.05**
Circuity of travel to and from property, **§ 151.04**
Comparable sales, **§ 151.12**
Concluding instruction, **§ 150.16**
Condemnor, sales to, **§ 151.13**
Construction and use, partial taking, **§ 150.14**
Costs
generally, **§ 151.06 to 151.08**
purchase price, **§ 151.06**
repairs to remainder, **§ 151.08**
reproduction or replacement, **§ 151.07**
Diversion of traffic, access, **§ 151.03**
Easement, measure of compensation, **§ 150.06.01**
Factors, **§ 150.10, 150.11**
Fair market value, defined, **§ 150.08**
Issues, **§ 150.02**
Just compensation
sole issue, **§ 150.03**
temporary occupancy, **§ 150.06.02**
witnesses, opinions, **§ 150.15**
Light. Access, light, view and air, above
Measure of compensation
generally, **§ 150.05 to 150.06.01**
access, light, view and air, **§ 151.02**
benefits, partial taking, **§ 150.07**
easement, **§ 150.06.01**

EMINENT DOMAIN—Cont'd
Measure of compensation—Cont'd
partial taking, **§ 150.06, 150.07**
total taking, **§ 150.05**
Offers, **§ 151.09**
Offsets against benefits, **§ 150.07.01**
Partial taking
agency plans, **§ 150.13**
construction and use, manner of, **§ 150.14**
factor, **§ 150.10**
measure of compensation, **§ 150.06, 150.07**
Plans of owner, **§ 151.10**
Platting, **§ 151.11**
Purchase price, costs, **§ 151.06**
Remote and speculative, factor, **§ 150.11**
Repairs to remainder, costs, **§ 151.08**
Reproduction or replacement, costs, **§ 151.07**
Sales
comparables, **§ 151.12**
condemnor, sales to, **§ 151.13**
Special instructions, generally, **§ 151 et seq.**
Temporary occupancy, just compensation, **§ 150.06.02**
Total taking, measure of compensation, **§ 150.05**
Uses, **§ 150.09**
Value to condemnor, **§ 151.14**
Verdict form, **§ 150.17**
View. Access, light, view and air, above
Witnesses, opinions regarding just compensation, **§ 150.15**
Zoning, **§ 151.15**

EMOTIONAL IMPAIRMENT
Mental illness, substantial adverse effects on cognitive or volitional functions of individual, definition of mental disorder, **§ 360.10**

EMPLOYMENT DISCRIMINATION
Generally, **§ 330.00 et seq.**
Adverse employment action, defined, **§ 330.01.02, 330.06**
After-acquired evidence, damages, **§ 330.81 to 330.81.02**
Bona fide occupational qualification defense, **§ 330.04**
Burden of proof
disability discrimination, below
disparate impact, business necessity, **§ 330.01.03**
disparate treatment, **§ 330.01, 330.01.01**
harassment, below
public policy, wrongful termination in violation of, **§ 330.51, 330.52**
religion or creed, discrimination based on, reasonable accommodation, **§ 330.41**
Business necessity, disparate impact, **§ 330.01.02, 330.01.03**

EMPLOYMENT DISCRIMINATION—Cont'd
Constructive discharge, wrongful termination in violation of public policy, burden of proof, **§ 330.52**
Cooperation of employee, reasonable accommodation, disability discrimination, **§ 330.35**
Creed, discrimination based on. Religion or creed, discrimination based on, below
Damages
generally, **§ 330.81 to 330.83**
after-acquired evidence, **§ 330.81 to 330.81.02**
economic and noneconomic damages, **§ 330.81, 330.81.01**
future lost earnings, **§ 330.82**
mitigation, wage loss, **§ 330.83**
Disability discrimination
generally, **§ 330.31 to 330.37**
burden of proof
reasonable accommodation, **§ 330.33**
treatment, **§ 330.32**
disability, defined, **§ 330.31**
employer notice and employee's duty to cooperate, reasonable accommodation, **§ 330.35**
essential function, defined, **§ 330.37**
impairment, defined, **§ 330.31.01**
reasonable accommodation
burden of proof, **§ 330.33**
definition, **§ 330.34**
employer notice and employee's duty to cooperate, **§ 330.35**
undue hardship, **§ 330.36**
Disparate impact
business necessity, burden of proof, **§ 330.01.03**
business necessity, defined, **§ 330.01.02**
Disparate treatment
generally, **§ 330.01 to 330.01.02**
adverse employment action, defined, **§ 330.01.02**
burden of proof, **§ 330.01, 330.01.01**
substantial factor, burden of proof, **§ 330.01.01**
Economic and noneconomic damages, **§ 330.81, 330.81.01**
Essential function, defined, **§ 330.37**
Future lost earnings, damages, **§ 330.82**
Harassment
generally, **§ 330.21 to 330.24**
burden of proof
hostile work environment, **§ 330.23**
quid pro quo, **§ 330.22**
hostile work environment
burden of proof, **§ 330.23**
manager and management, defined, **§ 330.24**
manager and management, defined, **§ 330.24**

EMPLOYMENT DISCRIMINATION—Cont'd
Harassment—Cont'd
quid pro quo, burden of proof, § **330.22**
Hostile work environment. Harassment, above
Impairment, defined, § **330.31.01**
Independent contractors, Minimum Wage Act, § **330.90**
Joint employer status, Minimum Wage Act, § **330.91**
Manager and management, defined, § **330.24**
Minimum Wage Act
employee vs. independent contractor, § **330.90**
joint employer status, § **330.91**
Mitigation of damages, wage loss, § **330.83**
Notice, reasonable accommodation, disability discrimination, § **330.35**
Public policy, wrongful termination in violation of
generally, § **330.50 to 330.52**
burden of proof, § **330.51, 330.52**
constructive discharge, burden of proof, § **330.52**
Quid pro quo, harassment, burden of proof, § **330.22**
Reasonable accommodation
disability discrimination, above
religion or creed, discrimination based on, burden of proof, § **330.41**
Religion or creed, discrimination based on
generally, § **330.40 to 330.42**
defense and undue hardship, failure to accommodate, § **330.42**
failure to accommodate
defense and undue hardship, § **330.42**
definition, § **330.40**
reasonable accommodation, burden of proof, § **330.41**
Retaliation
generally, § **330.05**
adverse employment action, defined, § **330.06**
Sexual harassment, quid pro quo, burden of proof, § **330.22**
Substantial factor, burden of proof, disparate treatment, § **330.01.01**
Undue hardship
disability discrimination, § **330.36**
religion or creed, discrimination based on, failure to accommodate, § **330.42**

EQUITABLE ESTOPPEL
Contracts, § **302.05, 302.06**

EXCESSIVE FORCE
Unreasonable or Excessive Force, this index

EXCUSE OF PERFORMANCE
Contracts, this index

EXEMPLARY DAMAGES
Punitive Damages, this index

EXIGENT CIRCUMSTANCES
Search and seizure, unreasonable search, § **341.07**

EXPECTATION DAMAGES
Contracts, § **303.01, 303.02**

EXPERT TESTIMONY
Mental illness, limitation on consideration of evidence, § **360.15**
Sexually violent predators, § **365.03**

FAIR DEALING
Contracts, implied duty, § **302.11**

FIDUCIARY RELATIONSHIP
Negligent misrepresentation, relationship of trust and confidence, § **165.03.04**

FINANCIAL INTEREST
Tortious interference with economic relations, business expectancy, § **352.06**

FORCE
Search and Seizure, this index
Unreasonable or Excessive Force, this index

FOURTEENTH AMENDMENT
Prisons and prisoners, failure to protect, burden of proof, § **343.07**

FRAUD
Generally, § **160.01 et seq.**
Burden of proof
generally, § **160.02 to 160.04**
issues, burden on, § **160.04**
preponderance of evidence, combined with, § **160.03**
Elements, § **160.01**
Negligent Misrepresentation, this index
Preponderance of evidence, combined with burden of proof, § **160.03**

FRUSTRATION OF PURPOSE
Contracts, § **302.10**

GOOD FAITH
Contracts, implied duty, § **302.11**
Insurance Bad Faith, this index

HARASSMENT
Employment Discrimination, this index

HIGHWAYS AND STREETS
Nuisance, interference with street or highway, § **380.01.01**

HOSTILE WORK ENVIRONMENT
Employment Discrimination, this index

IMPOSSIBILITY OR IMPRACTICABILITY
Contracts, § **302.09**

INDEPENDENT CONTRACTORS
Employment discrimination, Minimum Wage Act, **§ 330.90**

INDUSTRIAL INSURANCE
Workers' Compensation, this index

INSTRUCTION
Municipal and Local Government Liability, this index

INSURANCE BAD FAITH
Generally, **§ 320.00 et seq.**
Burden of proof
generally, **§ 320.01**
third party claims, **§ 320.01.01**
First-party claims, denial of, **§ 320.04**
General duty of good faith, **§ 320.02**
Insurance Fair Conduct Act, **§ 320.06.01**
Investigation, failure to conduct, **§ 320.05**
Regulations regarding settlement, violations of, **§ 320.06**
Reservation of rights, failure to act in good faith in defending subject to, **§ 320.03**
Settlement
failure to explore, **§ 320.05**
regulations, violations of, **§ 320.06**
Special verdict form, failure to act in good faith, **§ 320.07**
Third party claims, burden of proof, **§ 320.01.01**

INTERFERENCE WITH ECONOMIC RELATIONS
Tortious Interference with Economic Relations, this index

INTOXICATING LIQUOR
Alcoholic Beverages, this index

INVESTIGATIONS
Insurance bad faith, failure to conduct investigation, **§ 320.05**

INVESTIGATORY STOPS
Search and seizure, reasonable suspicion, **§ 341.10**

INVOLUNTARY TREATMENT
Generally, **§ 360.00 et seq., 365.00 et seq.**
Mental Illness, this index
Sexually Violent Predators, this index

JOINT EMPLOYERS
Employment discrimination, Minimum Wage Act, **§ 330.91**

JUST COMPENSATION
Eminent Domain, this index

LEGALLY PROTECTED INTEREST
Tortious interference with economic relations, contracts, **§ 352.04**

LESS RESTRICTIVE ALTERNATIVE
Mental illness, **§ 360.05.02**
Sexually Violent Predators, this index

LIGHT
Eminent Domain, this index

LIQUIDATED DAMAGES
Contracts, **§ 303.07**

LOCAL GOVERNMENT LIABILITY
Municipal and Local Government Liability, this index

LOST PROFITS
Contracts, **§ 303.04**

MEDICAL CARE
Prisons and Prisoners, this index

MEDICAL OPINIONS
Workers' compensation, extent of disability or aggravation, **§ 155.09**

MENTAL ILLNESS
Generally, **§ 360.00 et seq.**
Advance oral instruction, **§ 360.01**
Assisted outpatient treatment, in need of
definition, **§ 360.05.03**
special verdict forms, **§ 360.23**
Burden of proof, **§ 360.06**
Concluding instruction, **§ 360.20**
Custody, defined, **§ 360.11**
Expert testimony, limitation on consideration of evidence, **§ 360.15**
Explanation, **§ 360.03**
Failure of respondent to testify, **§ 360.14**
Gravely disabled, defined, **§ 360.12**
History of violent acts, defined, **§ 360.13.01**
Introductory instruction, conclusion of trial, **§ 360.02**
Involuntary treatment, generally, **§ 360.00 et seq.**
Less restrictive alternative, **§ 360.05.02**
Likelihood of repeating similar acts, **§ 360.05.01**
Likelihood of serious harm, defined, **§ 360.13**
90 days
generally, **§ 360.04**
special verdict forms, **§ 360.21**
180 days
generally, **§ 360.05**
special verdict forms, **§ 360.22**
Organic, mental or emotional impairment that has substantial adverse effects on cognitive or volitional functions of individual, definition of mental disorder, **§ 360.10**
Overt act, defined, **§ 360.13.01**

MENTAL ILLNESS—Cont'd
Special verdict forms
generally, § **360.21 to 360.23**
assisted outpatient treatment, in need of, § **360.23**
90 days, § **360.21**
180 days, § **360.22**
Violent act, defined, § **360.13.01**

MINIMUM WAGE ACT
Employment Discrimination, this index

MINORS
Alcoholic Beverages, this index

MISREPRESENTATION
Fraud, this index
Negligent Misrepresentation, this index

MISTAKE
Contracts, § **301.08, 301.09**

MITIGATION OF DAMAGES
Contracts, § **303.06**
Employment discrimination, wage loss, § **330.83**

MODIFICATION
Contracts, § **301.07**

MUNICIPAL AND LOCAL GOVERNMENT LIABILITY
Generally, § **341.01 et seq.**
Burden of proof, failure to train, supervise or instruct, § **341.02**
Civil rights, generally, § **341.01 et seq.**
Deliberate indifference, defined, § **341.04**
Failure to train, supervise or instruct
burden of proof, § **341.02**
deliberate indifference, defined, § **341.04**
Policy or custom inferred from ratification of conduct, § **341.03**
Unreasonable force, punitive damages, § **348.12**

MUTUAL ASSENT
Contracts, § **301.03**

MUTUAL MISTAKE
Contracts, § **301.08**

NEGLIGENT MISREPRESENTATION
Generally, § **165.00 et seq.**
Affirmative misstatement, burden of proof on issues, § **165.01**
Burden of proof on issues, failure to disclose information, § **165.02**
Clear, cogent and convincing evidence
generally, § **165.03.05**
preponderance of evidence, combined with, § **165.03.06**

NEGLIGENT MISREPRESENTATION—Cont'd
Duty to disclose
generally, **§ 165.03 to 165.03.02**
failure to disclose information, **§ 165.03**
mixed issues of fact and law, **§ 165.03.01, 165.03.02**
special verdict form, mixed issues of fact and law, **§ 165.03.02**
Failure to disclose information
burden of proof on issues, **§ 165.02**
duty to disclose, **§ 165.03**
fiduciary relationship, relationship of trust and confidence, **§ 165.03.04**
Fiduciary relationship, relationship of trust and confidence, **§ 165.03.04**
Mixed issues of fact and law, duty to disclose, **§ 165.03.01, 165.03.02**
Preponderance of evidence, combined with clear, cogent and convincing evidence, **§ 165.03.06**
Special verdict form, mixed issues of fact and law, duty to disclose, **§ 165.03.02**

NOTICE
Employment discrimination, reasonable accommodation, disability discrimination, **§ 330.35**

NUISANCE
Generally, **§ 380.00 et seq.**
Affirmative defense, absence of, burden of proof, **§ 380.05**
Assumption of risk, burden of proof, **§ 380.06**
Balancing test, **§ 380.03**
Burden of proof
affirmative defense, absence of, **§ 380.05**
assumption of risk, coming to nuisance, **§ 380.06**
Coming to nuisance, burden of proof, **§ 380.06**
Definition, **§ 380.01, 380.01.01**
Per se nuisance, **§ 380.04**
Public/private nuisance, defined, **§ 380.02**
Street or highway, interference with, **§ 380.01.01**

OBVIOUSLY INTOXICATED PERSONS
Alcoholic Beverages, this index

OFFERS
Eminent domain, **§ 151.09**

OFFSETS
Eminent domain, **§ 150.07.01**

ORGANIC IMPAIRMENT
Mental illness, substantial adverse effects on cognitive or volitional functions of individual, definition of mental disorder, **§ 360.10**

PAROL EVIDENCE
Contracts, interpretation, **§ 301.06**

PARTIAL TAKING
Eminent Domain, this index

PERFORMANCE
Contracts, this index

PERMANENT PARTIAL DISABILITY
Workers' Compensation, this index

PERMANENT TOTAL DISABILITY
Workers' Compensation, this index

PER SE NUISANCE
Generally, § **380.04**

PHYSICIANS
Workers' compensation, testimony of attending physician, § **155.13.01**

PLATTING
Eminent domain, § **151.11**

PRE-EXISTING CONDITIONS
Workers' Compensation, this index

PREPONDERANCE OF EVIDENCE
Fraud, combined with burden of proof, § **160.03**
Negligent misrepresentation, combined with clear, cogent and convincing evidence, § **165.03.06**

PRISONS AND PRISONERS
Burden of proof
generally, § **343.01**
failure to protect, § **343.05, 343.07**
medical care, § **343.03**
Civil rights, generally, § **343.00 et seq.**
Conditions of confinement, generally, § **343.00 et seq.**
Deliberate indifference
failure to protect, § **343.06**
medical care, § **343.04**
Eighth Amendment, generally, § **343.00 et seq.**
Excessive force, burden of proof on issues, § **343.08**
Failure to protect
generally, § **343.05 to 343.07**
burden of proof on issues, § **343.05, 343.07**
deliberate indifference, § **343.06**
Fourteenth Amendment, failure to protect, burden of proof on issues, § **343.07**
General conditions of confinement, § **343.02**
Medical care
burden of proof on issues, § **343.03**
deliberate indifference, § **343.04**

PRIVATE DISPUTES
Consumer protection, public interest, § **310.05**

PROBABLE CAUSE
Search and Seizure, this index

PROMISSORY ESTOPPEL
Contracts, § **301A.01**

PROXIMATE CAUSE
Workers' Compensation, this index

PUBLIC INTEREST
Consumer Protection, this index

PUBLIC POLICY
Employment Discrimination, this index

PUNITIVE DAMAGES
Civil Rights, this index
Municipal and local government liability, unreasonable force, § **348.12**

PURCHASE PRICE
Eminent domain, costs, § **151.06**

QUASI-CONTRACT
Generally, § **301A.02**

QUID PRO QUO
Employment discrimination, harassment, burden of proof, § **330.22**

RATIFICATION OF CONDUCT
Municipal and local government liability, inference of policy or custom, § **341.03**

REASONABLE ACCOMMODATION
Employment Discrimination, this index

REASONABLE DOUBT
Sexually Violent Predators, this index

REASONABLENESS
Consumer protection, defense, § **310.02**

RELIANCE DAMAGES
Contracts, § **303.05**

RELIGIOUS DISCRIMINATION
Employment Discrimination, this index

REMOTE AND SPECULATIVE
Eminent domain, § **150.11**

REPAIRS
Eminent domain, costs of repairs to remainder, § **151.08**

REPLACEMENT
Eminent domain, costs, § **151.07**

REPRODUCTION
Eminent domain, costs, § **151.07**

RESERVATION OF RIGHTS
Insurance bad faith, failure to act in good faith in defending subject to reservation, **§ 320.03**

RESTITUTION
Contracts, **§ 303.08**

RETALIATION
Employment Discrimination, this index

SALES
Eminent Domain, this index

SEARCH AND SEIZURE
Generally, **§ 341.01 et seq.**
Arrest. Unreasonable arrest or seizure of person, below
Burden of proof
unreasonable force, **§ 341.01**
unreasonable search, **§ 341.04**
Consent, unreasonable search, **§ 341.06**
Exigent circumstances, unreasonable search, **§ 341.07**
Force. Unreasonable force, below
Investigatory stop, reasonable suspicion for, **§ 341.10**
Lawful arrest, search incident to, **§ 341.05**
Person, seizure of. Unreasonable arrest or seizure of person, below
Probable cause. Unreasonable arrest or seizure of person, below
Seizure of person, defined, **§ 341.02**
Unreasonable arrest or seizure of person
generally, **§ 341.08 to 342.10**
investigatory stop, reasonable suspicion for, **§ 341.10**
probable cause
belief that crime was committed, **§ 341.08**
considerations, **§ 341.09**
warrant requirement, exceptions to, **§ 341.08 to 342.10**
Unreasonable force
burden of proof, **§ 341.01**
definition, **§ 341.03**
Unreasonable search
generally, **§ 341.04 to 341.07**
burden of proof on issues, **§ 341.04**
consent, **§ 341.06**
exigent circumstances, **§ 341.07**
lawful arrest, search incident to, **§ 341.05**
warrant requirement, exceptions to, **§ 341.05 to 342.07**
Warrant requirement, exceptions to
unreasonable arrest or seizure of person, **§ 341.08 to 342.10**
unreasonable search, **§ 341.05 to 342.07**

SECTION 1983
Civil rights, claims instruction, **§ 340.01**

SETTLEMENT
Insurance Bad Faith, this index

SEXUAL HARASSMENT
Employment discrimination, quid pro quo, burden of proof, § **330.22**

SEXUALLY VIOLENT PREDATORS
Generally, § **365.00 et seq.**
Advance oral instruction
conditional release/less restrictive alternative placement (LRA), § **365.30**
initial commitment, § **365.01**
Concluding instruction, § **365.20**
Conditional release/less restrictive alternative placement (LRA)
generally, § **365.30 to 365.33**
advance oral instruction, voir dire, § **365.30**
elements, § **365.31**
less restrictive alternative, defined, § **365.32**
reasonable doubt, § **365.33**
Elements for commitment, § **365.10**
Expert testimony, basis of, § **365.03**
Initial commitment, verdict form, § **365.21**
Introductory instruction, conclusion of trial, § **365.02**
Involuntary treatment, generally, § **365.00 et seq.**
Less restrictive alternative placement. Conditional release/less restrictive alternative placement (LRA), above
Likely to engage, defined, § **365.14**
Mental abnormality, defined, § **365.12**
Opinion testimony, limitation on consideration of evidence, § **365.04**
Personality disorder, defined, § **365.12.01**
Predatory, defined, § **365.13**
Reasonable doubt
conditional release/less restrictive alternative placement (LRA), § **365.33**
definition, § **365.11**
Recent overt act, defined, § **365.15**
Sexual violence, defined, § **365.16**
Unconditional discharge trial
doubt, defined, § **365.35**
elements, § **365.34**
Verdict
conditional release/less restrictive alternative, § **365.37**
unconditional discharge, § **365.36**
Voir dire
generally, § **365.01**
conditional release/less restrictive alternative placement (LRA), § **365.30**

SOCIAL HOSTS
Alcoholic beverages, furnishing alcohol to minor, § **370.12, 370.13**

SPECIAL VERDICTS
Workers' compensation, § **155.14**

SPECIAL WORK
Workers' compensation, permanent total disability, **§ 155.07.01**

SPECULATIVE AND REMOTE
Eminent domain, **§ 150.11**

STREETS AND HIGHWAYS
Nuisance, interference with street or highway, **§ 380.01.01**

SUPERVISION
Municipal and Local Government Liability, this index

TEMPORARY OCCUPANCY
Eminent domain, just compensation, **§ 150.06.02**

THIRD PARTY CLAIMS
Insurance bad faith, burden of proof, **§ 320.01.01**

TORTIOUS INTERFERENCE WITH ECONOMIC RELATIONS
Generally, **§ 352.01 et seq.**
Affirmative defenses
burden of proof, **§ 352.01 to 352.02.01**
business expectancy, interference with, **§ 352.05, 352.06**
contract, interference with, legally protected interest, **§ 352.04**
Burden of proof
generally, **§ 352.01 to 352.02.01**
affirmative defenses, **§ 352.01 to 352.02.01**
business expectancy, interference with, **§ 352.02, 352.02.01**
contract, interference with, **§ 352.01, 352.01.01**
Business expectancy, interference with
burden of proof on issues, **§ 352.02, 352.02.01**
competition, affirmative defense, **§ 352.05**
financial interest, affirmative defense, **§ 352.06**
Competition, interference with business expectancy, **§ 352.05**
Contract, interference with
generally, **§ 302.08**
burden of proof on issues, **§ 352.01, 352.01.01**
legally protected interest, affirmative defense, **§ 352.04**
Financial interest, interference with business expectancy, **§ 352.06**
Improper purpose, improper means, defined, **§ 352.03**
Legally protected interest, interference with contract, **§ 352.04**

TRADE SECRETS
Generally, **§ 351.01 et seq.**
Burden of proof, **§ 351.01**
Improper means, defined, **§ 351.04**
Independent economic value, defined, **§ 351.05**
Misappropriation, defined, **§ 351.03**
Readily ascertainable, defined, **§ 351.06**
Reasonable efforts to maintain secrecy, defined, **§ 351.08**
Reverse engineering, defined, **§ 351.07**

TRADE SECRETS—Cont'd
Trade secret, defined, § **351.02**

TRAINING
Civil rights, failure to train or inadequacy of training, § **340.05**
Municipal and Local Government Liability, this index

UNDUE HARDSHIP
Employment Discrimination, this index

UNDUE INFLUENCE
Contracts, § **301.11**

UNILATERAL MISTAKE
Contracts, § **301.09**

UNREASONABLE OR EXCESSIVE FORCE
Civil rights, punitive damages, § **348.10 to 348.12**
Municipal and local government liability, punitive damages, § **348.12**
Prisons and prisoners, burden of proof, § **343.08**
Search and Seizure, this index

VALUE
Eminent domain, § **151.14**

VERDICTS
Civil Rights, this index
Eminent domain, § **150.17**
Mental Illness, this index
Negligent misrepresentation, mixed issues of fact and law, duty to disclose, § **165.03.02**
Sexually Violent Predators, this index
Workers' compensation, special verdict, § **155.14**

VIEW
Eminent Domain, this index

VOIR DIRE
Sexually Violent Predators, this index

WAIVER
Contracts, performance, § **302.07**

WARRANTS
Search and Seizure, this index

WITNESSES
Eminent domain, opinions regarding just compensation, § **150.15**

WORKERS' COMPENSATION
Generally, § **155.00 et seq.**
Aggravation
generally, § **155.11 to 155.12.01**
burden of proof, § **155.11.01, 155.12.01**

WORKERS' COMPENSATION—Cont'd
Aggravation—Cont'd
extent of aggravation, basis of medical opinion, § **155.09**
lack of prior award, § **155.12, 155.12.01**
prior award, § **155.11, 155.11.01**
Asymptomatic pre-existing condition, lighting up of, § **155.20**
Attending physician, testimony of, § **155.13.01**
Burden of proof
generally, § **155.03**
aggravation, § **155.11.01, 155.12.01**
Categories of impairment, permanent partial disability, § **155.08, 155.08.01**
Conclusion of trial, § **155.01**
Evidence limited to record, § **155.01.01**
Extent of disability or aggravation
generally, § **155.10**
medical opinion, basis of, § **155.09**
Findings of board, § **155.02**
Industrial insurance system, explanation of, § **155.04**
Introductory instruction, § **155.01**
Issues, § **155.02.01**
Medical opinion, extent of disability or aggravation, § **155.09**
Negligence not issue, § **155.05**
Occupational disease, defined, § **155.30**
Particular worker, injury to, § **155.25**
Permanent partial disability
generally, § **155.08, 155.08.01**
categories of impairment, § **155.08, 155.08.01**
Permanent total disability
generally, § **155.07**
special work, § **155.07.01**
Pre-existing conditions
asymptomatic condition, lighting up of, § **155.20**
symptomatic condition, worsening of, § **155.21**
Prior award, aggravation, § **155.11, 155.11.01**
Proximate cause
generally, § **155.06 to 155.06.03**
allowed claim, § **155.06, 155.06.02**
rejected claim, § **155.06.01, 155.06.03**
Special verdict, § **155.14**
Special work, permanent total disability, § **155.07.01**
Symptomatic pre-existing condition, worsening of, § **155.21**
Treatment, defined, § **155.31**
Weighing medical and lay testimony, § **155.13**

ZONING
Eminent domain, § **151.15**